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NO. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ATLANTA GAS LIGHT COMPANY

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

John E. Holtzinger, Jr.
Karol Lyn Newman
(Counsel of Record)
1800 M Street, N.W.
Washington, D.C. 20036

Attorneys for Petitioner

Of Counsel:

Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

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List In Compliance With Rule 28.1

Atlanta Gas Light Company

QUESTION PRESENTED FOR REVIEW

Whether Congress intended to forbid pre-enforcement review of effective federal regulations under the Powerplant and Industrial Fuel Use Act of 1978.

PARTIES BELOW

Atlanta Gas Light Company
Laclede Gas Company
American Gas Association
Entex, Inc.
United States Department of Energy

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IN THE

Supreme Court of the United States

October Term, 1981

Atlanta Gas Light Company,

Petitioner,

v.

Department of Energy,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Atlanta Gas Light Company ("Atlanta Gas") petitions this Court for a writ of certiorari to review the February 1, 1982, decision of the United States Court of Appeals for the Eleventh Circuit in *Atlanta Gas Light Company, et al. v. Department of Energy,* Nos. 79-2568, *et al.*, dismissing, as not ripe for review, Atlanta Gas' challenge to federal regulations imposing prohibitions against providing natural gas service for use in outdoor lighting.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 666 F.2d 1359 and is reprinted in Appendix A.[1]

JURISDICTION

The court of appeals entered judgment on February 1, 1982, and denied a timely petition for rehearing and suggestion for rehearing *en banc* on March 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

This case involves the Fifth Amendment to the United States Constitution, which provides, in pertinent part:

> No person ... shall ... be deprived of life, liberty, or property, without due process of law ....

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[1]The case below was briefed before the effective date of the Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (Oct. 14, 1980) and was originally argued before that court. However, after argument, the parties were notified by order of the court that Judge Thomas A. Clark had become aware that he was disqualified to sit in the case and that the case would be calendared for reargument before an entirely new panel. By the time of reargument, October 26, 1981, the Reorganization Act was in effect and the case was heard before a panel of the Eleventh Circuit. Because the first petition to review was filed by Atlanta Gas which resides and has its principal place of business in the Eleventh Circuit, it appears that that circuit would retain jurisdiction in the event of remand by this Court. FUA Section 702(c), 42 U.S.C. § 8412(c); 28 U.S.C. § 2112.

STATUTORY AND REGULATORY PROVISIONS

The statute upon which the court of appeals' decision is based is the Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. §§ 8302 *et seq.* (Supp. IV 1980) (the 'Fuel Use Act" or "FUA"). The regulations upheld by the court below are published at 10 C.F.R. §§ 516.10 *et seq.* (1981). Relevant portions of the statute and regulations are reprinted in Appendix B and Appendix C, respectively.[2]

STATEMENT OF THE CASE

The Fuel Use Act, one of five pieces of legislation encompassing the National Energy Act[3] establishes, through section 402, a federal program to restrict the use of natural gas in outdoor lighting. In the absence of a delegation to the States, the program is to be created, administered and enforced by the Secretary of Energy ("Secretary").

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[2]For ease of citation, all references to 42 U.S.C. relate to Supplement IV of the 1980 edition unless otherwise noted. Similarly, all references to 10 C.F.R. are to the 1981 version unless otherwise noted. The statute was amended by the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 617 (1981). The statute, as amended, appears in Appendix B to this Petition. The regulations were most recently amended at 47 Fed. Reg. 23,436-23,439 (1982) (to be codified at 10 C.F.R. Part 516). The regulations, as amended, appear in Appendix C to this Petition.

[3]The other four statutes are The Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351; the National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206; the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117; and the Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174.

Section 402(a), which prohibits the installation of outdoor gas lights by local distribution companies or direct industrial users, is the only element of the program actually created by statute.[4] The remainder of the program is to be created by rule.

Section 402(b) requires the Secretary to promulgate a rule prohibiting local distribution companies from providing natural gas service for use in outdoor lighting:

> Not later than 180 days after November 9, 1978, the Secretary shall, by rule, prohibit any local distribution company (unless an exemption has been obtained under subsection (c) of this section) from providing natural gas service for use in outdoor lighting.[5]

In furtherance of section 402(b), the Secretary promulgated a regulation prohibiting local distribution companies from providing natural gas service for use in outdoor lighting:

> (a) *Prohibition.* No local distribution company shall supply natural gas for use in any outdoor lighting fixture except for residential outdoor lighting fixtures, as that term is defined in § 516.11(i).[6]

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[4] 42 U.S.C. § 8372(a); App. B at 4.

[5] 52 U.S.C. § 8372(b); App. B at 5.

[6] 10 C.F.R. § 516.21(a); App. C at 6. The term "residential outdoor lighting fixture" is defined in § 516.11(i) as:

> a natural gas outdoor lighting fixture which was installed prior to, and was in service in connection with a residence on November 9, 1978.

The prohibition became effective on May 8, 1979, as to any light not in service on November 9, 1978;[7] on November 5, 1979, as to industrial and commercial lights in service on November 8, 1978; and on January 1, 1982, as to municipal lights in service on November 9, 1978.[8]

Section 402(c) requires the Secretary to issue orders exempting historical lights, memorial lights, and certain commercial lights from the prohibitions. Other exemptions are required to be granted upon a finding by the Secretary that an exemption is consistent with the public interest, is necessary to protect persons or property, or is necessary to permit the installation of substitute lighting.[9] Instead of promulgating regulations to establish procedures to implement the exemptions, the Secretary delegated to the state agencies this responsibility and authority, as well as his responsibility to enforce the prohibitions and his obligation to provide enforcement guidelines.[10] According to the

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[7]Residential lights in service on November 9, 1978, are excluded by statute from the prohibition against service. 42 U.S.C. § 8372(b), as amended; App. B at 5.

[8]10 C.F.R. §§ 626.21; App. C at 6.

[9]42 U.S.C. § 8372(c); App. B at 7.

[10]Congress had instructed the Secretary:

> The conferees intend that the Secretary's enforcement of civil penalties be reasonable. For instance, lights that are located on the users [sic] side of the meter, and are not visible from the street may present problems to a company enforcing the ban. Similarly, a light that was turned off by the company, and later reconnected by the residential user may be difficult to detect. *The Secretary should provide some guidance.*

H.R. Rep. No. 95-1749, 95th Cong., 2d Sess. 89, *reprinted in* [1978] U.S. Code Cong. & Ad. News 8760, 8782 (emphasis added).

Secretary's regulations, the delegation became effective on May 8, 1979.[11]

Contrary to the Eleventh Circuit's analysis, the Secretary did not delegate *all* of his responsibility and authority to the state agencies. This is evident from the Secretary's regulations. The prohibition against service is clear, unequivocal, and results from the regulations of the Secretary, not the States. The Secretary's regulations delegating his remaining authority to the state agencies also leave no doubt that the prohibition is intended to remain in effect whether or not the States implement the remainder of the program. That the authority to eliminate the prohibitions was not delegated to the state agencies is clear from the Secretary's regulations:

> The authorities and responsibilities delegated by this rule to the appropriate State regulatory authorities *are those enumerated in paragraphs (a) through (h) of this section.*[12]

As can be seen by paragraphs (b)-(f) of those regulations, the Secretary delegated numerous functions to the state agencies but the prohibitions were neither repealed nor their effectiveness stayed:

> (b) *Authority to issue orders.* The authority to issue orders exempting certain natural gas outdoor lighting fixtures *from the prohibitions set forth in Subpart B of this rule* is delegated to the appropriate State regulatory authorities. . . .
>
> * * *
>
> (c) *Authority to establish exemption criteria.* The authority to establish criteria to be used in making

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[11] 10 C.F.R. § 516.30; App. C at 7.

[12] *Id.*

any determinations to issue any orders relating to exemptions *from the prohibitions set forth in Subpart B of this rule* is delegated to the appropriate State regulatory authorities.

* * *

(d) *Authority to establish exemption procedures.* The authority to establish procedures for the acceptance, processing, consideration, and grant or denial of applications and requests for exemptions *from the prohibitions set forth in Subpart B of this rule* is delegated to the appropriate State regulatory authorities.

(e) *Authority to establish enforcement mechanisms.* The authority to establish enforcement policies, criteria and procedures with respect to *the prohibitions set forth in Subpart B of this rule* is delegated to the appropriate State regulatory authorities.

(f) *Authority to enforce prohibitions and assess civil penalties.* The authority to enforce the *prohibitions set forth in Subpart B of the rule,* including the authority to assess civil penalties for noncompliance with such prohibitions ... is delegated to the appropriate State regulatory authorities.[13]

* * *

Violations of either the statute or the regulations are punishable by civil fines of up to five hundred dollars per light which may be levied against local distribution

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[13]10 C.F.R. § 516.30(b)-(f)(1981) (emphasis added); App. C at 7--8.

companies or their corporate officers.[14] Additionally, injunctive relief against violations of the statute or its regulations may be sought by the Secretary against any person.[15]

Atlanta Gas argued below that because the Secretary bifurcated the Congressionally-directed program into two segments--(1) prohibitions and (2) exemptions, enforcement, and compliance guidelines--and implemented only the prohibitions, Atlanta Gas was denied due process of law by being subjected to a federal program that was vague and unworkable. Whereas Congress intended that the prohibitions be tempered by mandatory and discretionary exemptions as well as enforcement guidelines, the Secretary promulgated a blanket prohibition against providing natural gas service for use in outdoor lighting.

The Eleventh Circuit dismissed the case, holding that Atlanta Gas' claim was not ripe for review.

REASON FOR GRANTING THE WRIT

The Court should grant the petition for certiorari for the following reason:

The Eleventh Circuit's dismissal of Petitioner's challenge to the federal prohibitions as not ripe for review is in direct conflict with *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

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[14] 42 U.S.C. § 8431; App. B at 10.

[15] 41 U.S.C. § 8434; App. B at 12.

ARGUMENT

Abbott Laboratories v. Gardner Requires Reversal Of The Decision Below

Atlanta Gas sought review of the Secretary's regulations to obtain a determination that without the Congressionally-mandated exemptions and the Congressionally-directed compliance guidelines the federal program denied Atlanta Gas due process of law.

The court below dismissed Atlanta Gas' challenge as not ripe for review on the ground that all authority to promulgate regulations to implement and enforce section 402 had been delegated to the States. As the court stated:

> [T]he Secretary of Energy has delegated to the states his *entire* authority under the Fuel Use Act. *See* 10 C.F.R. § 516.30 (1981). [16]

The court then concluded that because there was no challenge by Altanta Gas to any state regulations, the challenge was premature:

> There is no allegation that a particular state has indeed enacted a set of vague and uncertain rules. Neither is there any claim that a state has nor will pass regulations holding a gas distribution company liable retroactively for violations occurring prior to the promulgation of the state rule .... The contingent nature of the petitioners' due process claim is of a sort that courts have in the past avoided until another day .... So shall we today.[17]

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[16] 666 F.2d at 1369; App. A at 23 (emphasis added).

[17] 666 F.2d at 1370; App. A at 25.

These quotations from the opinion below make it abundantly clear that the court viewed the delegation as a relinquishment by the Secretary of all of his power under the statute to the States. Thus, as the court below saw it, absent a rescission of the delegation by the Secretary, the Secretary was powerless to act, having delegated all of his authority to the States. That this assumption was incorrect is now obvious. Whereas prior to the court's decision the Secretary remained silent to the meaning of his regulations, since the decision below issued, the Secretary has conceded that he retains the authority and responsibility "to administer all aspects of the natural gas outdoor lighting program when the appropriate State regulatory authorities have not accepted the delegation or when the delegation has been rescinded purusant to 10 C.F.R. § 516.32."[18] There is no evidence in the record that all of the States have accepted the delegation, indeed the record below is clear that the State of Texas specifically refused to accept the delegation. Yet, the Secretary refused to promulgate the guidelines requested, advising the parties below that such responsibility had been delegated to the States.

Thus, Atlanta Gas' claim is not contingent. The Secretary's prohibition is in effect today and could result in the assessment of fines and penalties against Atlanta Gas and its corporate officers. The challenge is to effective and enforceable federal regulations establishing a prohibition, violations of which are punishable by civil fines. The case is ripe for review.

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[18] 47 Fed. Reg. 23436, 23437 (May 28, 1982).

In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1966) the Court identified three factors that would have to be present before pre-enforcement review of federal regulations would be barred: (1) the underlying statute must specifically preclude pre-enforcement review; (2) the issues must not be fit for judicial review; and (3) the challenged agency action must have no direct or immediate impact on the challenging parties. None of these factors is present in this case. Yet, in its first published pre-enforcement review case, the Eleventh Circuit has departed from these standards and denied Atlanta Gas a forum in which to obtain review of effective federal regulations.

A. The Act Specifically Authorizes Pre-Enforcement Review of the Regulations

Section 702 of the Act specifically provides for judicial review by any aggrieved person of any final rule of the Secretary "imposing a prohibition".[19] No party has ever disputed that the Secretary's regulation creating a general prohibition against providing natural gas service to a customer who uses such gas for outdoor lighting is a final rule which operates directly on Atlanta Gas. As acknowledged by the court below:

> [T]he Fuel Use Act regulations promulgated by the Secretary of Energy are directed not to the "States as States", but rather to the wholly private natural gas distribution industry. *They prohibit actions taken by private gas companies.*[20]

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[19] 42 U.S.C. § 8421(a), (c); App. B at 9.

[20] 666 F.2d at 1368; App. A at 21. Atlanta Gas is a local distribution company within the meaning of FUA § 402(g)(3), 42 U.S.C. § 8472(g)(3); App. B at 9.

A person is aggrieved by the final rule of the Secretary if he has suffered an injury to an interest arguably within the zone of interests to be protected or regulated by the agency under the applicable statute. *Sierra Club v. Morton,* 405 U.S. 727, 733 (1972) *citing Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 153 (1970) and *Barlow v. Collins,* 397 U.S. 159, 163-164 (1970). Applying this test, it is clear that Atlanta Gas is aggrieved.

The Secretary's failure to promulgate regulations providing compliance guidelines, while leaving the regulatory prohibitions in effect, creates a serious dilemna for local distribution companies. Congress recognized that without the exemptions or the compliance guidelines the prohibitions would be excessive and unworkable. As the conferees instructed the Secretary:

> The conferees intend that the Secretary's enforcement of civil penalties be reasonable. For instance, lights that are located on the users [sic] side of the meter, and are not visible from the street may present problems to a company enforcing the ban. Similarly, a light that was turned off by the company, and later reconnected by the residential user may be difficult to detect. *The Secretary should provide some guidance.*[21]

Because all of the States have not acted under the "delegation" and promulgated enforcement guidelines, the unqualified federal prohibition has been left in place. Local distribution companies, therefore, are confronted with the unacceptable option

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[21]See note 10, *supra.*

of carrying out their common law and state law duties as public utilities while risking violations of the federal law, or disregarding those legal obligations in an effort to comply with the federal prohibitions.

A brief description of the manner in which natural gas service is provided to residential customers provides the background against which the dilemna can be explained.

Natural gas service generally is provided to individual residences through a single service line stemming from a gas main (a larger pipe which may provide natural gas to thousands of service lines). Service lines typically run under private property through easements granted to the local distribution company to its gas meter. Thereafter, gas is distributed to gas lights, as well as other appliances, through the customer's fuel line on the customer's side of the meter.

Most gas utilities do not sell or install outdoor gas lights and have not done so for years. New lights can be installed without the knowledge of the company, it being perfectly legal for anyone other than a local distribution company to install a new outdoor natural gas light and connect it to the customer's side of the meter. For this reason, and because most gas lights are not separately metered, there is no way for Atlanta Gas to determine which customers own gas lights without a complete survey of every customer in the service area. And, even if each residential gas light could be located, there is no way, absent complete cooperation from its customers, for Atlanta Gas to determine whether the light is exempt because it was installed and in use on November 9, 1978. Because use is not prohibited and the prohibition against service operates only against the

gas company, the customer is under no compulsion to accurately represent to the gas company the date of installation nor the date of use of the gas light.

In order to stop supplying natural gas for use in outdoor lighting, service must be terminated either at the lighting fixture (on private property) or at the point where the service line joins the gas main underground near the curb (on public property). Absent permission from the customer to enter on his property to disconnect the gas light at the lighting fixture, service would have to be disconnected at the gas main. This would result in discontinuing natural gas service to the entire residence, not just to the gas light. No authority exists under section 402 of the Fuel Use Act to discontinue gas service to an entire residence whether or not the owner uses natural gas in his outdoor gas light, any more than authority exists to discontinue gas service to a home because of an inefficient gas stove or hot water heater.

If Atlanta Gas were to discontinue service to a household using an exempt light, it could be sued in damages for an injury sustained to persons or property during the period of discontinuance,[22] face complaint proceedings before the Georgia Public Service Commission ("Georgia P.S.C.") for violating its tariff and the rules and regulations of the Georgia P.S.C., and possibly lose its franchise. On the other hand, if Atlanta Gas were to continue service and the light is not exempt, the company and its officers could face penalties and fines under section 723(c).[23]

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[22]Lawrence v. Atlanta Gas Light Company, 49 Ga. App. 444, 176 S.E. 75 (1934); Elwell v. Atlanta Gas Light Company, 51 Ga. App. 919, 181 S.E. 599 (1935).

[23]42 U.S.C. § 8433(c); App. B at 11.

Altanta Gas faces a real and serious problem created by the Secretary's failure to carry out his full responsibility under the statute. Without compliance guidelines, Atlanta Gas faces serious questions of whether to undertake the extreme measures required by the federal regulations and terminate all gas service to customers who have outdoor gas lights, or continue to carry out its duty as a public utility and provide continuous and reliable gas service, risking federal fines and penalties. The prohibitions were not stayed pending the promulgation of appropriate regulations by state authorities. They are in effect and compliance is demanded.

As a person directly and adversely affected by the Secretary's final rule prohibiting service for use in outdoor gas lights, Atlanta Gas is *specifically* authorized by statute to bring a review proceeding. To suggest that the Secretary's "delegation" to the States somehow bars Atlanta Gas from pre-enforcement review of the Secretary's regulations is to deny the existence of the prohibition and its direct operation on Atlanta Gas.

B. The Issue Presented Is Purely Legal

The question presented by this case is purely legal. The Secretary's action in making the prohibitions immediately effective without promulgating similarly effective regulations providing enforcement guidelines raises the purely legal issue of whether the Secretary's action denies Atlanta Gas due process of law.

The Secretary has made it clear that enforcement guidelines will not be forthcoming. The adjudication of the Secretary's obligation to complete the federal program will neither entangle the courts in abstract

disagreements over administrative policies nor will it result in judicial interference in administrative decision-making. The regulatory prohibitions in issue are final, having been promulgated after notice in the Federal Register and the consideration of comments. The rule is neither informal nor tentative and was not the ruling of a subordinate official. It is in effect and there is no question but that compliance is expected. Violations carry fines and penalties which can be levied against the companies or their corporate officials.

C. The Impact On Atlanta Gas Is Immediate and Direct

The regulations create an effective prohibition against providing natural gas service to certain categories of non-exempt customers without providing a means for determining which customers are exempt or a mechanism for reasonable enforcement. In order to carry out its duties and responsibilities as a public utility, Atlanta Gas is faced with the unacceptable choice of providing natural gas service to its customers at the risk of prosecution for serving gas that may well be used in non-exempt outdoor lights or complying with federal law and run the risk of violating non-preempted state laws.

CONCLUSION

No basis exists for denying Atlanta Gas its right to judicial review of the Secretary's effective federal regulations under section 402 of the Fuel Use Act. Accordingly, because the Eleventh Circuit's decision directly conflicts with this Court's decision in *Abbott Laboratories v. Gardner*, a writ of certiorari should issue to review the judgment and the opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

John E. Holtzinger, Jr.
Karol Lyn Newman
(Counsel of Record)
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5000

Attorneys for Petitioner
Atlanta Gas Light Company

Of Counsel:

Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

APPENDIX

APPENDIX A
OPINION BELOW

ATLANTA GAS LIGHT COMPANY,
Petitioner,
v.
U.S. DEPARTMENT OF ENERGY,
James B. Edwards, Secretary of Energy, Economic Regulatory Administration, Hazel Rollins, Administrator, Respondent.

ENTEX, INC., *Petitioner,*
v.
U.S. DEPARTMENT OF ENERGY, ECONOMIC REGULATORY ADMINISTRATION, *Respondent.*

LACLEDE GAS COMPANY,
Petitioner,
v.
U.S. DEPARTMENT OF ENERGY,
James B. Edwards, Secretary of Energy, Economic Regulatory Administration, Hazel Rollins, Administrator, *Respondent.*

AMERICAN GAS ASSOCIATION,
Petitioner,
v.
U.S. DEPARTMENT OF ENERGY,
James B. Edwards, Secretary of Energy, Economic Regulatory Administration, Hazel Rollins, Administrator, *Respondent.*

Nos. 79-2568, 79-3237, 80-1573, 80-7491 and 80-7528.

United States Court of Appeals, Eleventh Circuit.

Feb. 1, 1982.

On petitions for review of orders of the United States Department of Energy, Economic Regulatory Administration, the Court of Appeals, Tuttle, Circuit

Judge, held that, in a preenforcement context, the Fuel Use Act and its regulations could not be held to be unconstitutional as violating due process clause of Fifth Amendment or as exceeding limits of constitutional congressional authority as embodied in both the commerce clause and Tenth Amendment.

Dismissed.

1. War and National Emergency

Under provision of Powerplant and Industrial Fuel Use Act of 1978 court's jurisdiction to review is prescribed by requirements set out in Administrative Procedure Act; such requirements include all general standing limitations to federal court jurisdiction. Powerplant and Industrial Fuel Use Act of 1978, §§ 402, 402(b)(1), (d), (e)(2), 702(c), (c)(2), 721, 723 as amended 42 U.S.C.A. §§ 8372, 8372(b)(1), (d), (e)(2), 8412(c), (c)(2), 8431, 8433; 5 U.S.C.A. § 702.

2. Federal Courts

Where no injury had yet occurred but it was alleged that injury would occur in future and where commerce clause challenge was unlikely to change in substance or in clarity by virtue of actual prosecution and where petitioners in case at bar were and would continue to be most appropriate parties to raise commerce clause objection against Fuel Use Act, court would adjudicate merits of commerce clause dispute before it. Power plant and Industrial Fuel Use Act of 178, § 402 as amended 42 U.S.C.A. § 8372; U.S.C.A. Const. Art. 1, § 8, cl. 3.

3. Commerce

Constitutionally prescribed inquiry in commerce clause challenge involving traditionally local activities necessitates at outset examination of effects of regulated activity on interstate commerce, and if such effects are wholly lacking, then federal law in question must be held unconstitutional, but court must also

assess rationality of congressional judgement in passing act, by inquiring whether there is rational activity and whether means chosen are reasonably adapted to achieve intended legitimate goals. U.S.C.A. Const. Art. 1, § 8, cl. 3.

4. Commerce

Fact that regulated conduct is wholly local activity does not necessarily lead to finding that Congress overstepped its powers under commerce clause. U.S.C.A. Const. Art. 1, § 8, cl.3.

5. Commerce
War and National Emergency

Though distribution of natural gas for outdoor lighting purposes is local activity, in sense that physical starting and ending points are geographically situated within borders of single state, there was rational basis for Congress' determination that interstate commerce was indeed affected by such regulated activity and, to protect against nationwide effects on interstate commerce, Congress could pass laws regulating distribution of natural gas. Powerplant and Industrial Fuel Use Act of 1978, §§ 102 et seq., 102(b), 201, 301, 402, 402(a), (b)(1) as amended 42 U.S.C.A. §§ 8301 et seq., 8301(b), 8311, 8341, 8372, 8372(a), (b)(1); U.S.C.A. Const. Art. 1, § 8, cl. 3.

6. Federal Civil Procedure

In view of the fact that injury in fact existed or was likely to occur in case at bar, and where case was not taxpayer suit, petitioners had standing to assert Tenth Amendment challenge to Fuel Use Act and regulations. Powerplants and Industrial Fuel Use Act of 1978, § 8301 et seq.; U.S.C.A. Const. amend. 10.

7. States
War and National Emergency

That Fuel Use Act regulations promulgated by Secretary of Energy preempted state regulations

contrary to or inconsistent with their contents did not implicate Tenth Amendment, and where although Secretary of Energy had delegated his powers under Act that states remained free to reject delegation and thereby refuse to implement Act, under terms of Act and regulations Secretary could do nothing more than rescind delegation, Act was not violative of Tenth Amendment. Powerplant and Industrial Fuel Use Act of 1978, § 102 et seq. as amended 42 U.S.C.A. § 8301 et seq.; U.S.C.A. Const. Amend. 10.

8. War and National Emergency

Congress and Department of Energy clearly intended that states be primary regulators under the Fuel Use Act. Powerplant and Industrial Fuel Use Act of 1978, § 102 et seq. as amended 42 U.S.C.A. § 8301 et seq.

9. Constitutional Law

Where petitioners in case at bar challenged, on due process grounds, only federal statute and implementing regulations, making no claim whatsoever regarding vagueness of particular state's regulatory program, and it was not clear which states would promulgate regulations under Act nor even which had accepted delegation of powers by Secretary of Energy, issue whether Fuel Use Act was unconstitutionally vague under due process clause of Fifth Amendment was not yet ripe for adjudication. Powerplant and Industrial Fuel Use Act of 1978, § 102 et seq. as amended 42 U.S.C.A. § 8301 et seq.; U.S.C.A. Const. Amend. 5.

Petitions for Review of Orders of the U.S. Department of Energy, the Economic Regulatory Administration.

Before TUTTLE, HATCHETT and ANDERSON, Circuit Judges:

TUTTLE, Circuit Judge:

This case arises out of a pre-enforcement challenge to the constitutionality of several provisions of the Power Plant and Industrial Fuel Use Act of 1978 (Fuel Use Act or Act), 42 U.S.C.A. § 8301, *et seq.* (1981), as amended by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 617 (1981). Additionally the petitioners attack the constitutionality of the regulations promulgated by the Secretary of Energy pursuant to the Fuel Use Act. In this appeal we consider whether the statute and its accompanying regulations violate the Due Process Clause of the Fifth Amendment, and whether Congress, in passing the Act, exceeded the limits of its constitutional authority as embodied in both the Commerce Clause and the Tenth Amendment. We conclude that in a pre-enforcement context such as the one presented here, the Act and its regulations cannot be held to be unconstitutional.

I.

A.

On November 9, 1978, the President signed into law five bills in a comprehensive attempt to improve our nation's energy situation. The Fuel Use Act, the subject of controversy in the present case, is one of the acts in this legislative package.[1]

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[1]The other four acts are the National Energy Conservation Policy *Act, 42 U.S.C.A.* §§ 8201—8286(b) (1981); the Energy Tax Act, 92 Stat. 3174 (codified in scattered sections of Title 26 of the U.S. Code); the Natural Gas Policy Act, 15 U.S.C.A. §§ 3301—3432 (1981); and the Public Utility Regulatory Policies Act, 15 U.S.C.A. §§ 2601-2645 (1981).

The purposes of the Fuel Use Act are, *inter alia*, to conserve natural gas for industrial uses for which there are no alternative fuels; to insure that adequate supplies of natural gas are available for certain essential agricultural uses; and, to reduce the vulnerability of the United States to energy supply interruptions. 42 U.S.C.A. § 8301(b) (1981). The predominant means of effectuating these goals are the Act's prohibitions on the use of natural gas or petroleum as a primary energy source in any new electric powerplant or major fuel burning installations, and the Act's requirement that existing powerplants convert to coal or other alternative fuels by January 1, 1990. 42 U.S.C.A. §§ 8311, 8341 (1981). In addition, the Act restricts the use of natural gas in outdoor lighting. 42 U.S.C.A. § 8372 (1981). This latter provision regulating outdoor lighting is the focus of the present appeal.

Section 402 of the Act instructs the Secretary of the Department of Energy to issue a rule prohibiting local gas distribution companies both from providing natural gas for use in outdoor lighting, 42 U.S.C.A. § 8372(b)(1), and from installing any outdoor lighting fixtures using natural gas. 42 U.S.C.A. § 8372(a).[2] Violators of Section

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[2]More precisely, the prohibitions in § 402 detail several schedules of effective dates depending on: (1) whether the customer is an industrial or residential user; (2) whether the gas company was distributing to a particular customer for gaslighting purposes on November 9, 1978; and, (3) whether the gas is being used in a municipal outdoor lighting fixture. See 42 U.S. C.A. § 8372 (1981). These scheduling differences are not relevant to the issues before the Court in this case.

Additionally, the 1981 amendments to the Act substantially alter the extent and timing of prohibition with respect to gas that is distributed to residential customers.

To avoid confusion, in this opinion discussions of the provisions of the Fuel Use Act will employ section numbers from the public law, whereas citations to the Act will refer to section numbers in the official codification.

402(b)(1) are subject to a fine not to exceed $500 for each outdoor lighting fixture involved. 42 U.S.C.A. § 8433 (1981).

[1] The Secretary of Energy is charged with primary responsibility for administering and enforcing the Act, and is authorized to promulgate regulations to that end. 42 U.S.C.A. §§ 8372(d), 8431 (1981). In addition, the Secretary may delegate to the appropriate regulatory authority of the States all authorities and responsibilities regarding outdoor lighting under Section 402.[3] Persons aggrieved by any final rule or order promulgated by the Secretary under the Act are granted a statutory right to file a petition for review in the United States Court of Appeals for the circuit wherein the person resides or has his or her principal place of business. 42 U.S.C.A. § 8412(c) (1981).[4]

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[3]The delegation provision reads:

> "(e) Authority may be delgated to the States—
> (1) Under regulations prescribed by the Secretary, the responsibility and authority of the Secretary with regard to outdoor lighting under this section may be delegated to the appropriate regulatory authority of a State if he determines that such delegation would be consistent with the purposes of this section."

42 U.S.C.A. § 8372(e)(1) (1981). Section 402(e)(2) empowers the Secretary to rescind this delegation "at any time by notifying the State authority of such rescission." 42 U.S.C.A. § 8372(e)(2) (1981).

[4]The statute aditionally provides that whenever such a petition is filed, the court's jurisdiction to review is prescribed by the requirements set out in the Administrative Procedure Act. 42 U.S.C. § 8412(c)(2) (1981). See 5 U.S.C.A. § 702 (1977). These requirements include all general standing limitations to federal court jurisdiction. See, e.g., *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

The regulations dealing with outdoor gaslighting were published on May 10, 1979, *see* 44 Fed. Reg. 27606 (1979), and amended on May 23, 1980. 45 Fed. Reg. 35206 (1980), later codified at 10 CFR §§ 516.10—.47 (1981). In these regulations, the Secretary issued a rule prohibiting installation of gaslights and distribution of gas for use in such lights in accordance with the explicit mandate of Section 402. In addition, the Secretary delegated his authorities and responsibilities to the appropriate state regulatory authority as permitted by the Act. Finally, the Secretary promulgated regulations authorizing the Department of Energy to rescind this delegation if it is found that a State has failed to comply with the Act or the regulations. *See* 10 CFR 516.30—.32 (1981).

In August of 1981 Congress passed the Omnibus Budget Reconciliation Act of 1981, Pub.L. No. 97-35, 95 Stat. 617 (1981). Section 1024 of this Act amends the Fuel Use Act by eliminating the prohibition on distribution of natural gas to residential users for outdoor lighting purposes in fixtures that were in use before November 9, 1978. These amendments also require local gas distribution companies to inform their customers about the amount and cost of natural gas used in outdoor lighting, and to report to the Secretary on their methods of dispersing such information.[5] Implementing regulations for these amendments have not yet been published.

B.

On July 2, 1979, Atlanta Gas Company (Atlanta Gas) petitioned this Court for review of the Fuel Use Act

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[5]For reasons that will become clear later in this opinion, these amendments do not affect the outcome of this case. Petitioners' claims that the amendments present additional vagueness problems is not persuasive in light of our holding that a due process challenge to the Act is not ripe at this time. See Slip op. p. 320, p. ____ *infra*.

regulations published in May, 1979. Petitioners Laclede Gas Company (Laclede) and the American Gas Association (A.G.A.) filed briefs *amicus curiae*. On January 24, 1980, this Court stayed further proceedings at the request of the government pending further rulemaking by the Secretary. After the Secretary published the amended regulations in May of 1980, Atlanta Gas filed and was granted a motion to amend its original petition to incorporate the amendments to the regulations. At that time this Court also consolidated various petitions for review filed in other circuit courts of appeals by Laclede, A.G.A., and Entex, Inc.[6] Because the petitioners have appealed directly to this Court from the rules issued by the Secretary of Energy, there is no record of findings or conclusions of law established by a lower tribunal.

II.

[2] Petitioners initially raise a facial attack on Section 402 of the statute and the accompanying regulations, on the ground that the prohibitions contained therein exceed the scope of congressional power under the Commerce Clause of the Federal Constitution.[7] They make three objections to the constitutionality of the Act

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[6]Laclede Gas Company's petition for review, filed in the United States Court of Appeals for the Eighth Circuit, was transferred to this Court, docketed as No. 80-7941, and consolidated with this proceeding by order of the Court issued on July 9, 1980. Entex, Inc.'s petition for review was filed with this Court, docketed as No. 80-1573, and consolidated with this proceeding on June 24, 1980. The American Gas Association's petition for review, filed in the United States Court of Appeals for the Fourth Circuit, was transferred to this Court, docketed as No. 80-7528 and consolidated with this proceeding on July 17, 1980.

[7]The Commerce Clause empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. 1, § 8, cl. 3.

We would admit at the outset some hesitancy in even entertaining jurisdiction to hear the merits of the Commerce

under the Commerce Clause. First, petitioners note that regulation of the distribution of natural gas has been a subject of purely local concern historically left within the purview of state or municipal regulatory authority. In support, they rely on several relatively old cases in which the United Stated Supreme Court declared that in the area of natural gas distribution, interstate commerce ends when the gas passes into the local mains of private distribution companies. *See, e.g., East Ohio Co. v. Tax Comm'n* 283 U.S. 465, 470—72, 51 S. Ct. 499, 500—01, 75 L.Ed. 1171 (1931); *Public Utilities Comm'n v. Landon*, 249 U.S. 236, 245, 39 S.Ct. 268, 269, 63 L.Ed. 577 (1919). Second, the petitioners argue that Congress had no rational basis for finding that the activity of distributing gas for outdoor lighting purposes affects interstate commmerce.

Clause challenge. As previously noted the suit is a pre-enforcement challenge. The petitioners in this case have not been prosecuted for violating any of the statutory provisions or regulations. Indeed no person has been so prosecuted, as the Act has yet to be enforced. Moreover, it is unclear at this time whether civil penalties for ongoing violations will be assessed whenever the Act is enforced. The speculative and contingent nature of petitioners' future economic injury makes this case of a kind that courts have in the past treated as unripe for adjudication. *See, e.g., United Public Workers of America v. Mitchell*, 330 U.S. 75, 89-90, 67 S.Ct. 556, 564—65, 91 L.Ed. 754 (1947) ("A hypothetical threat is not enough.") Nor does the tenuousness of the injury end there. The states, if they accept the Secretary's delegation, have full power to administer and enforce the Act. Presumably one state could decide to enforce the Act retroactively, whereas another could within its terms grant immunity to all past violators up to the day the state enforcement regulations are promulgated. No evidence has been submitted by any party suggesting how any of the states plan to initiate enforcement of the Act. That the petitioners come from different states makes it all the more unclear the precise nature and extent of the injury with which we are dealing under the Commerce Clause challenge.

Nevertheless, although the injury has not yet occurred but is merely one that the petitions allege will occur in the future, this is not dispositive of the standing or ripeness issue. *See Pennsylvania v. West Virginia*, 262 U.S. 553, 555, 593, 43 S.Ct. 658, 659, 663-64, 67 L.Ed.

Finally, they assert that the means chosen by Congress under the Fuel Use Act is not reasonably adapted to the ends set out in the first section of the Act, namely, to conserve natural gas and to protect industries whose only viable source of power is natural gas.

[3] We agree with the petitioners' framing of the relevant issues in a constitutional attack upon federal legislation based upon the Commerce Clause. The constitutionally prescribed inquiry in a Commerce Clause challenge involving traditionally local activities necessitates at the outset and examination of the effects of the regulated activity on interstate commerce. *United States* v. *Darby*, 312 U.S. 100, 121, 61 S.Ct. 451, 460, 85 L.Ed. 609 (1941). If such effects are wholly lacking, then the federal law in question must be held

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1117 (1923) ("[o]ne does not have to await the consummation of a threatened injury to obtain preventative relief.") Moreover, in the present case, the Commerce Clause challenge is unlikely to change in substance or in clarity by virture of an actual prosecution. Thus another of the values inherent in the ripeness doctrine, namely, the need for a concrete presentation of the issues, would not be served by awaiting enforcement. *See Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 153, 87 S.Ct. 1507, 1517, 18 L.Ed.2d 681 (1967). Finally, the petitioners, in this case are now, and will in the future continue to be the most appropriate parties to raise the Commerce Clause objection. The Fuel Use Act, in its minimal prohibitive capacity, operates against local gas distribution companies. The petitioners are the entities against whom fines will be levied for noncompliance, if and when the Act is enforced.

In any event, this case is quite similar to two recent Supreme Court decisions in which the Court heard and determined the merits of a pre-enforcement, Commerce Clause challenge to other federal statutes and regulations. *See Hodel v. Virginia Surface Min. & Rec. Ass'n*, _____ U.S. _____, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Hodel v. Indiana*, _____ U.S. _____, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981). Neither of these opinions mentions any standing problems, and so we view them as adequate precedent for our decision to adjudicate the merits of the Commerce Clause dispute before us.

unconstitutional. Additionally the Court must assess the rationality of the congressional judgment in passing the Act. This involved an inquiry into: (1) whether there is a rational basis for Congress' determination that interstate commerce is indeed affected by the regulated activity; and, (2) whether the means chosen are reasonably adapted to achieve the intended legitimate goal. *Hodel v. Virginia Surface Min. & Rec. Ass'n*, _____ U.S. _____, 101 S.Ct. 2352, 2360, 69 L.Ed.2d 1 (1981).

[4] Nevertheless, we differ with the petitioners on the appropriate result that follows from this inquiry. The mere fact that an admitted local or intrastate activity such as the distribution of natural gas to local customers is affected by federal regulation does not automatically lead to a judgment that Congress has overstepped its powers under the Commerce Clause. As the Court said in *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 85 L.Ed. 609 (1941), "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." Id. at 118, 61 S.Ct. at 459.[8] Numerous other

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[8]We recognize that the quoted language in *Darby* may present a problem of circular reasoning with respect to the question, "Which intrastate activities are an appropriate subject of the federal power to regulate interstate commerce?" Nevertheless, the *Darby* case at least establishes that the fact that the regulated conduct in this case is a wholly local activity does not necessarily lead to a finding that Congress has overstepped its powers under the Commerce Clause. *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 569, 59 S.Ct. 993, 1011, 83 L.Ed. 1446 (1939) ("Activities conducted within State lines do not by this fact alone escape the sweep of the Commerce Clause. Interstate commerce may be dependent upon them.")

cases make it clear that the federal government may pass legislation to foster and protect the flow of interstate commerce even though the regulated activity may be purely local in character. Thus in *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), the Court upheld federal legislation setting quotas on the production of wheat even though the regulations interfered with the wholly local pursuit of growing wheat for personal consumption. These cases require that the courts view the regulated activity in the context of the nationwide movement of commerce to determine whether there exists significant effects on interstate commerce.

[5] In the present case, such effects are beyond dispute. It is of course true that the distribution of natural gas for outdoor lighting purposes is a local activity in the sense that its physical starting and ending points are geographically situated within the borders of a single state. But to so view the activity is to extract it from its place in interstate commerce and thus ignore its substantial ramifications for, and effects upon, such commerce. Local gas companies distribute natural gas to a variety of customers for a variety of uses. And a significant amount of gas is used to heat the office buildings of countless corporations, most of which are engaged in interstate, if not international, commerce. Decisions concerning the local distribution of natural gas thus directly affect the flow of interstate commerce. More importantly, as natural gas becomes more scarce, the reverberative adverse effects of decisions to supply non-necessary uses such as outdoor decorative lights will be felt with increasing alarm in the commercial community. Even if such effects seem minor in the context of one local gas company and its clientele, the combined effect of distribution decisions being made by companies all over the nation is substantial. *See Wickard v. Filburn*, 317 U.S. 111, 127–28, 63 S.Ct. 82,

90–91, 87 L.Ed. 122 (1942). To protect against these nationwide effects on interstate commerce, Congress may pass laws that impinge on intrastate activities. *See United States v. Darby, supra*, 312 U.S. at 114, 61 S.Ct. at 457.

Petitioners' citation to several relatively old United States Supreme Court cases does not persuade us to take a different view. *Federal Power Comm'n v. East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266, 94 L.Ed. 268 (1950); *East Ohio Gas Co. v. Tax Comm'n of Ohio*, 283 U.S. 465, 51 S.Ct. 499, 75 L.Ed. 1171 (1931); *Public Utilities Comm'n of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 47 S.Ct. 294, 71 L.Ed. 549 (1927); *Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298, 44 S.Ct. 544, 68 L.Ed. 1027 (1924); *Public Utilities Comm'n For the State of Kansas v. Landon*, 249 U.S. 236, 39 S.Ct. 268, 63 L.Ed. 577 (1919). In these cases the Court characterized the activity of distributing natural gas a purely local affair. They are nevertheless distinguishable from the present case in two significant respects. First and most importantly, the cases involved only state regulation of local gas distribution companies and thus the question of the extent of federal commerce power was not before the Court.[9] The issue presented in each case was whether the activity of distributing natural gas should be characterized as interstate commerce for purposes of determining whether the disputed state regulations improperly interfered with the flow of such

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[9]In point of fact one of the cases cited dealt with federal regulations. In *Federal Power Comm'n v. East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266, 94 L.Ed. 268 (1950), the Court upheld the extension of federal regulatory power over a gas company that transported natural gas through interstate pipelines for local distribution. That case can only support the principles set out in this opinion.

commerce.[10] In that context, the Court declared the regulations permissible, holding that the interstate aspect of natural gas commerce terminated at the local mains. *E.g., Public Utilities Comm'n v. Landon*, 249 U.S. 236, 245, 39 S.Ct. 268, 269, 63 L.Ed. 577 (1919). The cases thus serve merely to delineate the extent of the flow of interstate commerce, and do not purport to define the extent of Congress' power to regulate activities affecting such commerce.[11] And we have already established that Congress' power to regulate commerce is not restricted to the regulation of only interstate commerce. See Slip op. p. 315, p. _____ *supra*. The fact that the Supreme Court has characterized gas distribution as a local activity is thus in no way determinative of the Commerce Clause issue before us today.

Secondly, the Court's characterization of gas distribution as a purely local activity must be squared with more recent cases firmly establishing that the activity involved in this case is one in interstate commerce. In *Katzenbach v. McClung*, 79 U.S. 294, 85 S.Ct. 377, 13 L.Ed2d 290 (1964), the Court upheld the power of Congress to prohibit racial discrimination in any restaurant serving food that has been shipped in interstate commerce. *Id.* at 304, 85 S.Ct. at 383-384. No

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[10]Since the case of *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299, 13 L.Ed 996 (1851), the Supreme Court has recognized a limitation on State authority to regulate activities in interstate commerce. These limitations arise by negative implication from the Constitution's express grant of power to the federal government to regulate interstate commerce, as well as from considerations of federalism that emanate from the system of government set up in the Constitution. See L. Tribe, American Constitutional Law 320-326 (1978).

[11]See *Katzenbach v. McClung*, 379 U.S. 294, 302, 85 S.Ct. 377, 383, 13 L.Ed.2d 290 (1964) (line of cases holding that interstate commerce ends when goods come to rest in state of destination applies to state regulation but not to federal regulation).

party to the present case denies that much of the natural gas supplied to local customers in one state has been piped from another state. This fact by itself is sufficient after *Katzenbach* to justify our understanding of the activity of gas distribution as one in interstate commerce.

With these points made we are left with the determination whether Congress acted rationally in adopting the Fuel Use Act. In short we believe Congress did act rationally in seeking to regulate local gas distribution by means of this Act.

First, it is clear that Congress has a rational basis for determining that distributing gas for use in outdoor lights affects interstate commerce. Congress was aware that a constant supply of natural gas is critical to the continued operation of many commercial industries in our country. Congressman Dingell, who introduced Section 402 of the Act, cited a study in support of the statue demonstrating that seemingly minor steps toward conserving natural gas could be of great protective benefit to industries that rely on gas for ongoing operations. Transcript, Joint Conference on Energy, 95th Cong., 1st Sess. 2009-2011, 2033—2036 (1977). In that study the Commonwealth of Virginia found that the potential gas savings resulting from a prohibition on natural gas use in outdoor lighting in the state of Virginia was sufficient to sustain for several weeks the massive local operations of the Allied Chemical Corporation. In addition, Congressman Dingell cited statistics established by the Federal Energy Agency estimating that the potential savings of natural gas due to a nationwide discontinuance of service to all outdoor lights in this country would be between 36 and 73 billion cubic feet of gas per year. Transcript, Joint Conference on Energy at 2034.[12]

[12]Congressman Dingell noted that the value of such gas was, at that time, between 10 and 15 billion dollars. Transcript, Joint Conference on Energy at 2036.

Petitioners argue that the relatively small amount of gas savings that would result from the prohibitions in Section 402, namely, two-tenths of one percent of all natural gas consumed annually, undercuts any rational basis Congress may have had in determining that distribution for such consumption affects interstate commerce. We may quickly dismiss this argument in the light of the recent *Hodel* cases, wherein the Supreme Court explicitly declared that the volume of commerce affected is not the touchstone of the rationality test under the Commerce Clause. *See Hodel v. Indiana*, ____ U.S. ____, 101 S.Ct. 2376, 2383, 69 L.Ed.2d 40 (1981).

Second, we find that the prohibitions contained in Section 402 are reasonably adapted to the legitimate goal of protecting interstate commerce from the adverse effects of using natural gas for outdoor lighting purposes. The gas saving produced by the Act's prohibitions benefit commercial industries by helping to protect them from the threat of gas shortages in critical periods of the year. The fact that these savings represent only a small percentage of total gas consumption does not undercut our judgment of the rationality of the means employed in this case. In the first place, as just indicated the volume of commerce involved is not the appropriate focus in determining the rationality of the congressional action.[13] More

[13]Admittedly, the Court in *Hodel* rejected the "volume of commerce" standard only in its discussion of the first aspect of the rationality test, namely, whether Congress had any rational basis for finding that the regulated activity affected interstate commerce. *Hodel v. Indiana*, ____ U.S. ____, 101 S.Ct. 2376, 2383, 69 L.Ed.2d 40 (1981). We feel it logically appropriate, however, to likewise reject this standard under the second, "reasonable related" prong of the rationality test. The Court in *Hodel* found the congressional act constitutional. If the volume of commerce involved in that case had been problematic under the "reasonably adapted" prong of the test, then we suggest that the Court would have held the Act unconstitutional. In the alternative, the Court's holding can be viewed as having implicity determined that the volume was sufficient to satisfy the "unreasonably adapted" test.

importantly, the relatively small gas savings resulting from the Fuel Use Act must be considered as an integral part of a much broader federal reglatory program aimed at shifting our nation's energy consumption toward fuels that are more plentiful and accessible than natural gas. When Section 402 is viewed both in conjunction with the other provisions of the Fuel Use Act regulating fuel use by local power companies, *see* Slip op. p. 311, p. _____ *supra*, and with the four other bills enacted collectively with the Fuel Use Act to deal with the national energy situation, *see* note 1, *supra*, we find that Section 402 is a rational part of a larger regulatory scheme the whole of which is reasonably adapted to the legitimate ends set out in the first provisions of the Act.[14]

III.

[6, 7] The petitioners also argue that Section 402 and the regulations violate the Tenth Amendment.[15] They rely principally on the case of *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), where the Supreme Court acknowledged that "there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution." *Id.* at 842, 96

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[14]*Hodel v. Indiana*, _____ U.S. _____, S. Ct. 2376, 69 L.Ed. 2d 40 (1981) ("It is enought that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.") *Id.* 2385 n. 17. *See Maryland v Wirtz*, 392 U.S. 183, 197 n27, 88 S.Ct. 2017, 2024 n.27, 20 L.Ed.2d 1020 (1968).

[15]The Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend.10.

S.Ct. at 2470. We cannot agree with petitioners for the reasons that follow.[16]

The most recent Supreme Court discussion of these Tenth Amendment limitations can be found in the companion *Hodel* cases previously mentioned. In *Hodel v. Virginia Surface Min. & Rec. Ass'n*, _____ U.S. _____, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), the Court decided that the success of a claim that the exercise of congressional commerce power violates the holding in the *Usery* case depends on the satisfaction of each of three requirements. "First, there must be a showing that the challenged statute regulates the 'States as States.' Second, the federal regulation must address matters that are indisputably 'attributes of state soveriegnty.' And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of

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[16]Just as in the Commerce Clause issue we must initially express our uncertainty about whether the petitioners have standing to raise the Tenth Amendment question. None of the petitioners are state or government officials of any kind. In *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), the Supreme Court intimated under its nexus requirement that a private party could not have standing to assert the interests of the states as protected by the Tenth Amendment. Nevertheless, we grant standing in this case for two reasons. First, during the New Deal era the Supreme Court granted such standing by implication in considering the merits of the Tenth Amendment claims brought by private parties. *See Helvering v. Davis*, 301 U.S. 619, 637, 640, 57 S.Ct. 904, 907, 908, 81 L.Ed. 1307 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548, 573, 585, 57 S. Ct. 883, 884, 890, 81 L.Ed. 1279 (1937). Second, the Court in *Duke Power Co. v. Carolina Env. Study Gruop*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), expressly limited the nexus requirement contained in *Flast* to taxpayer suits. Since this is not a taxpayer suit, under *Duke Power* the petitioners may make constitutional objections based on any of its provisions so long as they show the requisite injury in fact and its causal relation to the action in question. Because we have already concluded that injury in fact exists or is likely to occur in this case, see note 7 *supra*, we find it necessary to reach the merits of the Tenth Amendment issue.

traditional functions.' " *Id.* at 2366. (Citations to *Usery* omitted.) In both *Hodel* cases, the Court held that the act in question [the Fair Labor Standards Act] did not satisfy the first requirement of regulating the states as states and thus did not violate the Tenth Amendment. *Id.; Hodel v. Indiana,* _____ U.S. _____, 101 S. Ct. 2376, 2386, 69 L.Ed.2d 40 (1981). For similar reasons, we also so hold.

In the first place, the Fuel Use Act regulations promulgated by the Secretary of Energy are directed not to the "States as States," but rather to the wholly private natural gas distribution industry. They prohibit actions taken by private gas companies. That they pre-empt state regulations contrary to or inconsistant with their contents does not implicate the Tenth Amendment. As the Court in *Usery* ruled:

> Congressional power over areas of private endeavour, even when its exercise may preempt express state-law determinations contrary to the result that has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that "the means chosen by [Congress] must be reasonably adapted to the ends permitted by the Constitution."

Id. 426 U.S. at 840, 96 S.Ct. at 2469 (quoting *Heart of Atlanta Motel v. United States,* 379 U.S. 241, 262, 85 S.Ct. 348, 360, 13 L.Ed.2d 258 (1964)). See *Hodel v. Virginia Surface Min. & Rec. Ass'n, supra* 101 S..Ct. at 2368 (1981) (Congress does not violate the Tenth Amendment simply because it acts in a way that displaces states' exercise of police powers).

It is true that the Secretary of Energy in accordance with his express statutory authorization has delegated his administrative and enforcement powers to the appropriate state regulatory authority. Petitioners interpret this delegation as a mandatory scheme whereby the states are forced to administer and enforce the regulatory prohibitions. As such they assert that the Tenth Amendment is implicated because it coercively appropriates state regulatory power to accomplish a federal regualtory objective. See *District of Columbia v. Train,* 521 F.2d 971, 990 (D.C.Cir. 1975).[17]

Whatever the force of their contention we do not consider it necessary to reach it in substance because we disagree with the petitioners' reading of the delegation provisions. Although the Secretary has delegated his powers under the Act, the states remain free to reject the delegation and thereby refuse to enforce the regulations. Should any state so refuse to implement the Act, under the terms of the Act and the regulations the Secretary can do nothing more than rescind the delegation. See 10 C.F.R. § 516.32 (1981). There is thus no

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[17] In *Hodel* the Court similarly indicated that Tenth Amendment problems might exist where a federal regulatory program requires the states to adopt implementing regulations. *Hodel v. Virginia Min. & Rec. Ass'n,* — U.S. — 101 S.Ct. 2352, 2366, 69 L.Ed2d 1 (1981). In that case the Court held that the federal statute gave the states a choice as to whether they or the federal government would administer and enforce the program and thus did not violate the Tenth Amendment.

element of coercion involved in the delegation. Just as in *Hodel*, the Act merely "establishes a program of cooperative federalism that allows the states within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel v. Virginia Surface Min. & Rec. Ass'n, supra* 101 S.Ct. at 2366 (1981). Such a regulatory scheme thus protects the states' interest in remaining free to "structure integral operations in areas of traditional governmental functions," *National League of Cities v. Usery, supra* 426 U.S. at 852, 96 S.Ct. at 2474, without running afoul of Tenth Amendment limitations.

IV.

The petitioners also urge this Court to hold the Fuel Use Act unconstitutionally vague under the Due Process Clause of the Fifth Amendment.[18] Essentially the petitioners complain of substantial uncertainty as to how best to comply with the prohibitions in Section 402. We do not reach the merits of the petitioners' due process claim because the issue is not ripe for adjudication at this time.

As we have indicated previously, the Secretary of Energy has delegated to the states his entire authority under the Fuel Use Act. See 10 C.F.R. § 516.30 (1981). Under the terms of this delegation, the states have the authority to promulgate regulations, establish exemption procedures and criteria and issue exemption orders, and establish enforcement mechanisms and

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[18]That provision states in pertinent part: "No person shall ... be deprived of ... property without due process of law ...." U.S. Const. amend. V. The courts have interpreted this clause to require that statutes be reasonably clear so that persons of common intelligence do not have to guess at their meaning and differ as to their application. *Conally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

assess civil penalties. In large part then, the regulations grant to those states that accept the delegation broad powers to promulgate their own set of regulations and exemption criteria. Moreover the delegation provisions give the states substantial flexibility in promulgating these regulations. That the states possess such regulatory freedom under the Act has been an explicit intention of Congress and the Department of Energy from the beginning. As the Department explained in their introductory comment to the proposed rules published in the Federal Register, "We propose to exercise this option [to delegate to the states], noting that the congressional conferees, in their Explanatory Statement for the Act, explicitly encouraged DOE to do so. Enforcement of the statutory provisions of the Act constitutes a regulatory activity most appropriately conducted at the State level . . . Delegating authority to the appropriate state regulatory authorities, with minimum Federal guidance, will allow sensitivity to local conditions."

[8, 9] Congress and the Department of Energy clearly intended that the states be the primary regulators under the Fuel Use Act. Yet the petitioners in the present case challenge on due process grounds only the federal statute and implementing regulations, making no claim whatsoever regarding the vagueness of a particular state's regulatory program. At this time it is not clear which states have promulgated regulations under the Act, nor even which have accepted the Secretary's delegation.[19] Until the petitioners can show that there presently exists a set of regulations so vague in their terms that reasonably intelligent persons would differ as

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[19]Apparently it is the case that the State of Texas, or rather the Texas Railroad Commission, has in fact sent a letter to the Secretary of Energy explicitly rejecting the delegation. The Secretary has not yet, however, rescinded the delegation.

to their meaning and application, then they have failed to establish a vagueness claim under the Fifth Amendment. *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

The petitioners claim that they are uncertain as to how they must comply with the prohibitions in Section 402 regarding distribution of gas to residential customers. In our opinion the claim is not ripe. There is no allegation that a particular state has indeed enacted a set of vague and uncertain rules. Neither is there any claim that a state has or will pass regulations holding a gas distribution company liable retroactively for violations occurring prior to the promulgation of the state rule. Presumably, a state could without overstepping its powers to establish exemption criteria under the federal regulation concerning delegation, exempt all pre-promulgation violators, thus leaving parties such as the petitioners in this case with no injury in fact. The contingent nature of the petitioners' due process claim is of a sort that courts have in the past avoided until another day. *See United Public Workers of America v. Mitchell*, 330 U.S. 75, 85-90, 67 S.Ct. 556, 561-65, 91 L.Ed. 754 (1947). So shall we today.

DISMISSED.

APPENDIX B

SELECTED PROVISIONS OF THE POWERPLANT AND INDUSTRIAL FUEL USE ACT OF 1978

42 U.S.C. § 8301 *et. seq.* (Supp. IV 1980)

As amended by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 617 (1981)

SUBCHAPTER I—GENERAL PROVISIONS

§ 8301. Findings; statement of purposes

(a) Findings.—The Congress finds that—

(1) the protection of public health and welfare, the preservation of national security, and the regulation of interstate commerce require the establishment of a program for the expanded use, consistent with applicable environmental requirements, of coal and other alternate fuels as primary energy sources for existing and new electric powerplants and major fuel-burning installations; and

(2) the purposes of this chapter are furthered in cases in which coal or other alternate fuels are used by electric powerplants and major fuel-burning installations, consistent with applicable environmental requirements, as primary energy sources in lieu of natural gas or petroleum.

(b) Statement of purposes.—The purpose of this chapter, which shall be carried out in a manner consistent with applicable environmental requirements, are—

(1) to reduce the importation of petroleum and increase the Nation's capability to use indigenous energy resources of the United States to the extent such reduction and use further the goal of national energy self-sufficiency and otherwise are in the best interests of the United States;

(2) to conserve natural gas and petroleum for uses, other than electric utility or other industrial or commercial generation of steam or electricity, for which there are no feasible alternative fuels or raw material substitutes;

(3) to encourage and foster the greater use of coal and other alternate fuels, in lieu of natural gas and petroleum, as a primary energy source;

(4) to the extent permitted by this chapter, to encourage the use of synthetic gas derived from coal or other alternate fuels;

(5) to encourage the rehabilitation and upgrading of railroad service and equipment necessary to transport coal to regions or States which can use coal in greater quantities;

(6) to prohibit or, as appropriate, minimize the use of natural gas and petroleum as a primary energy source and to conserve such gas and petroleum for the benefit of present and future generations;

(7) to encourage the modernization or replacement of existing and new electric powerplants and major fuel-burning installations which utilize natural gas or petroleum as a primary energy source and which cannot utilize coal or other alternate fuels where to do so furthers the conservation of natural gas and petroleum;

(8) to require that existing and new electric powerplants and major fuel-burning installations which utilize natural gas, petroleum, or coal or other alternate fuels pursuant to this chapter comply with applicable environmental requirements;

(9) to insure that all Federal agencies utilize their authorities fully in furtherance of the purposes of this chapter by carrying out programs designed to prohibit or discourage the use of natural gas and petroleum as a primary energy source and by taking such actions as lie within their authorities to maximize the efficient use of energy and conserve

natural gas and petroleum in programs funded or carried out by such agencies;

(10) to insure that adequate supplies of natural gas are available for essential agricultural uses (including crop drying, seed drying, irrigation, fertilizer production, and production of essential fertilizer ingredients for such uses);

(11) to reduce the vulnerability of the United States to energy supply interruptions; and

(12) to regulate interstate commerce.

§ 8302. Definitions

(a) **Generally.**—Unless otherwise expressly provided, for the purposes of this chapter—

(1) The term "Secretary" means the Secretary of Energy.

(2) The term "person" means any (A) individual, corporation, company, partnership, association, firm, institution, society, trust, joint venture, or joint stock company, (B) any State, the District of Columbia, Puerto Rico, and any territory or possession of the United States, or (C) any agency or instrumentality (including any municipality) thereof.

* * *

§ 8372. Prohibition on use of natural gas for decorative outdoor lighting

(a) Prohibition on installation of new outdoor lighting

Effective beginning on November 9, 1978, no local distribution company, or any industrial user of natural gas who obtains such gas under a contract between such user and a natural gas pipeline, or any agent thereof, shall install any outdoor lighting fixture using natural gas.

(b) Prohibition on selling natural gas to be used in outdoor lighting. (1) Not later than 180 days after the date of the enactment of this Act [enacted Nov. 9, 1978], the Secretary shall, by rule, prohibit any local distribution company (unless an exemption has been obtained under subsection (c)) from providing natural gas service for use in outdoor lighting (other than any outdoor lighting fixture which was installed before the date of the enactment of this Act [enacted Nov. 9, 1978] in connection with a residence and for which natural gas was being provided on such date of enactment [enacted No, 9, 1978])—

(A) effective on the date such final rule is issued, in the case of any residential, commercial, or industrial customer unless a later effective date is applicable under subparagraph (B) or (C) of this paragraph;

(B) effective beginning 180 days after the date such final rule is issued, in the case of any industrial or commercial structure for which natural gas was being provided by such company for outdoor lighting use on November 9, 1978; and

(C) effective beginning January 1, 1982, in the case of any municipal outdoor lighting fixture for which natural gas was being provided by such company for outdoor lighting use on the date of the enactment of this Act [enacted Nov. 9, 1978].

(2) The rule prescribed under paragraph (1) shall provide that any industrial user of natural gas who obtains such natural gas under a contract between such user and a natural gas pipeline shall be prohibited from using such natural gas for outdoor lighting (unless an exemption has been obtained under subsection (c) of this section)—

(A) effective 180 days after the date such final rule takes effect, if the industrial user was using natural gas for outdoor lighting on November 9, 1978; or

(B) beginning on the date such final rule takes effect, if such industrial user was not so using natural gas on such date.

(c) Exemptions

(1) The Secretary shall, by order—

(A) exempt from the prohibition under subsection (a) of this section the installation of a replacement lighting fixture for any memorial light or light of historical significance, and

(B) permanently exempt from a prohibition under subsection (b) of this section the use[1] natural gas in any memorial light or light of historical significance.[2]

If a petition for such exemption is made by a Federal, State, or local government agency or by any appropriate historical association.

(2) The Secretary shall, by order—

(A) exempt from the prohibition under subsection (a) of this section, upon a petition therefor, the installation of a replacement lighting fixture for any natural gas outdoor lighting, and

(B) permanently exempt from a prohibition under subsection (b) of this section, upon a petition therfor, use of natural gas for outdoor lighting,

which is used for commercial purposes, which is of a traditional nature, and which conforms with the cultural or architectural style of the area in which such light is located.

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[1]So in original. Probably should be "use of".

[2]So in original. Period should probably be a comma.

(3) The Secretary shall by order, exempt any local distrubtion company or industrial user described in subsection (b)(2) of this section, from the rule required to be prescribed under subsection (b) of this section concerning the continuation of such service in effect on November 9, 1978, upon the filing of a petition therefor by such pipeline or company, or by any other interested person. Such exemption shall be for such period as, and to the extent that, the Secretary finds—

(A) such exemption is necessary to protect the safety of persons or property;

(B) such exemption is necessary to permit the installation of substitute lighting where no adequate outdoor lighting (other than that using natural gas) exists on November 9, 1978;

(C) compliance with such rule would entail substantial expense and would not be cost justified; or

(D) the issuance of the exemption is in the public interest and is consistent with the purposes of this chapter.

(4) Determinations on any petition for an exemption under this section shall be made under criteria which the Secretary shall establish by rule, which rule shall be prescribed not later than 180 days after the effective date of this chapter.

(d) Procedures

Rules and orders under this section shall be made in accordance with the provisions of section 553 of title 5, except that determinations on any petition for exemption under this section shall be made only after interested persons have been afforded an opportunity for a public hearing. Under rules prescribed by the Secretary, the Secretary may stay the application of any prohibition under subsection (b) of this section applicable to any person pending the resolution of any petition for an exemption for such person.

(e) Authority may be delegated to States

(1) Under regulations prescribed by the Secretary, the responsibility and authority of the Secretary with regard to outdoor lighting under this section may be delegated to the appropriate regulatory authority of a State if he determines that such delegation would be consistent with the purposes of this section.

(2) Any delegation under paragraph (1) shall be on terms and conditions prescribed by the Secretary and may be rescinded by the Secretary at any time by notifying the State authority of such rescission.

(3) Any State authority to which the Secretary has delegated authority under this subsection shall prepare and transmit reports to the Secretary on a periodic basis (as determined by the Secretary) on actions taken to carry out the purposes of this section.

(f) Information as to cost of gas lighting. (1) For the purpose of discouraging the use of natural gas for outdoor lighting, each local distribution company which is subject to subsection (a) or (b) shall, in accordance with rules promulgated by the Secretary—

(a) establish a reasonable and simple method, as determined by each such company, by which the company shall periodically inform its customers about the amount of natural gas consumed by outdoor lighting and the annual cost of such gas for such lighting; and

(B) by report to the Secretary the method established under subparagraph (A).

A company may establish a method which provides for reporting such information on the basis of estimates where actual information is not readily available.

(2) The Secretary shall propose the rules referred to in paragraph (1) as promptly as possible after the date of the enactment of this subsection [enacted Aug. 13, 1981], and such rules shall take effect not later than the

ninetieth day after they are proposed. In promulgating such rules, the Secretary shall, to the greatest extent feasible, consult with the appropriate regulatory authority of the States and the local distribution companies who will be subject to the rules.

(g) Definitions. As used in this section—

(1) The term "outdoor lighting" means lighting by any stationary source which is not located inside any building.

(2) The term "pipeline company" means any person engaged in the business of transporting natural gas by pipeline other than as a local distribution company.

(3) The term "local distribution company" means any person engaged in the business of transportation and local distribution of natural gas and the sale of natural gas for ultimate consumption.

(4) The term "residence" means any single or multiple family dwelling unit, including commonly held areas associated with any such unit.

(As amended Aug. 13, 1981, P.L. 97-35, Title X, Subtitle B, § 1024, 95 Stat. 617).

PART A — PROCEDURES

* * *

§8412 Judicial Review

(c) Judicial Review — (1) Any person aggrieved by any final rule or order [prescribed by the Secretary imposing a prohibition or granting an exemption] ... may at anytime before the 60th day after the date such rule, order, or denial is published ... file a petition with the United States Court of Appeals for the Circuit wherein such person resides, or has his principle place of business, for review thereof.

* * *

PART C — ENFORCEMENT

§ 8431. Notice of violation; other general provisions

(a) Notice of violation.—(1) Whenever, on the basis of any information available, the Secretary finds that any person is in violation of any provision of this chapter, or any rule or order thereunder, the Secretary shall issue notice of such violation. Any notice issued under this subsection shall be in writing and shall state with reasonable specificity the nature of the violation.

(2) Paragraph (1) shall not be construed to relieve any person of liability under the other provisions of this chapter for any act or omission occuring before the issuance of notice.

(b) Individual liability of corporate personnel.—Any individual director, officer, or agent of a corporation who willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of this chapter, or any rule or order thereunder, shall be subject to penalties under this section without regard to any penalties to which the corporation may be subject, except that no such individual director, officer, or agent shall be subject to imprisonment under section 8432 of this title, unless he also knew of noncompliance by the corporation or had received from the Secretary notice of noncompliance by the corporation.

§ 8433. Civil penalties

(a) General civil penalty.—Any person who violates any provision of this chapter (other than section 8372 of this title), or rule or order thereunder, shall be subject to a civil penalty, which shall be assessed by the Secretary, of not more than $25,000 for each violation. Each day of violation shall constitute a separate violation.

* * *

(c) Penalties for violation of section 8372 of this title.— (1) Any person who violates any prohibition under subsection (b) (1) of section 8372 of this title with respect to providing of natural gas service to any person for use in outdoor lighting shall be subject to a civil penalty, which shall be assessed by the Secretary and which shall not exceed $500 for each outdoor lighting fixture involved.

(2) Any industrial user who violates prohibition under subsection (b) (2) of section 8372 of this title shall be subject to a civil penalty, which shall be assessed by the Secretary and which shall not exceed $500 per day of violation for each outdoor lighting fixture involved which was used by an industrial customer, but not to exceed $5,000 per outdoor lighting fixture involved.

(3) The penalties under this subsection shall only apply in the case of a violation by any person who at the time of the violation had knowledge or reasonably should have had knowledge that the action involved was prohibited under section 8372 of this title.

§ 8434. Injuctions and other equitable relief

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in acts or practices constituting a violation of this chapter, or any rule or order thereunder, a civil action, may be brought, in accordance with section 7192(c) of this title, in the appropriate district court of the United States to enjoin such acts or practices, and, upon a proper showing, the court shall grant, without bond, mandatory or prohibitive injunctive relief, including interim equitable relief.

§ 8435. Citizens suits

(a) General rule.—Except as otherwise provided in subsection (b) of this section, any aggrieved person may commence a civil action for mandatory or prohibitive injunctive relief, including interim equitable relief, against the Secretary or the head of any Federal agency which has a responsibility under this chapter if there is an alleged failure of the Secretary or such agency head to perform any act or duty under this chapter which is not discretionary. The United States district courts shall have jurisdiction over actions brought under this section, without regard to the amount in controversy or the citizenship of the parties.

(b) Notice to Secretary or agency head.—No action may be commenced under subsection (a) of this section before the 60th calendar day after the date on which the plaintiff has given notice of such action to the Secretary or the agency head involved. Notice under this subsection shall be given in such manner as the Secretary shall prescribe by rule.

APPENDIX C

REGULATIONS ISSUED BY THE DEPARTMENT OF ENERGY UNDER SECTION 402 OF THE POWERPLANT AND INDUSTRIAL FUEL USE ACT

10 C.F.R. §§ 516.10 *et seq.*, as amended,
47 Fed. Reg. 23436-23439 (May 28, 1982)

PART 516—PROHIBITION ON SALE AND DIRECT INDUSTRIAL USE OF NATURAL GAS FOR OUTDOOR LIGHTING

Subpart A—General Purpose and Scope; Definitions

Sec.
516.10 General purpose and scope.
516.11 Definitions

Subpart B—Prohibitions

516.20 General prohibition on installation of natural gas outdoor lighting fixtures.
516.21 General prohibition on sale of natural gas for use in outdoor lighting.

Sec.
516.22 Prohibition on use of natural gas by direct industrial customers for outdoor lighting.

Subpart C—Delegation of Authority

516.30 Scope
516.31 Annual reports.
516.32 Rescission.

Subpart D—Guidance on Exemptions

516.40 Applicability.
516.41 Lighting of historical significance.
516.42 Memorial lighting.
516.43 Commercial lighting of a traditional nature.
516.44 Safety of persons and property.
516.45 Time to install substitute lighting.
516.46 Compliance which entails substantial expense and would not be cost justified.
516.47 Public interest.

AUTHORITY: Sec. 402, Pub. L. 95-620; 92 Stat. 3315; 42 U.S.C. 8372.

SOURCE: 44 FR 27607, May 10, 1979, unless otherwise noted.

Subpart A—General Purpose and Scope; Definitions

§516.10 General purpose and scope.

(a) The purpose of this rule is to implement section 402 of Pub. L. 95-620, the Powerplant and Industrial Fuel Use Act of 1978 (the Act). The objective of section 402 of the Act is to eliminate the nonessential use of natural gas for outdoor lighting and to conserve such gas for the benefit of present and future generations.

(b) The rule consists of four subparts. Subpart A consists of this subsection, entitled "General Purpose and Scope," and § 516.11, "Definitions."

(c) Subpart B contains the prohibitions on the installation of natural gas outdoor lighting fixtures and the sale and direct industrial use of natural gas for outdoor lighting. Section 516.20 prohibits the installation of natural gas outdoor lighting fixtures. Sections 516.21 and 516.22 prohibit local distribution companies from providing natural gas to residential, commercial, and industrial customers for use in outdoor lighting as well as prohibiting the use of natural gas by direct industrial customers for outdoor lighting.

(d) Subpart C delegates to the appropriate State regulatory authorities the responsibility and authority of the Secretary of DOE with regard to natural gas outdoor lighting. The specific authorities delegated are set forth in § 516.330. Section 516.31 sets forth the requirements for annual reports which the appropriate State regulatory authorities are required to submit to ERA. Section 516.32 provides for rescission, by ERA, of the delegation of authority as it applies to any particular State.

(e) Subpart D sets forth guidance to be followed by the appropriate State regulatory authorities in granting or denying requests for exemption in the absence of the

exercise of authority by the State in promulgating its own criteria. Criteria for granting or denying exemptions are provided for each of the categories of exemption established by the Act: Lighting of historical significance (§ 516.41); memorial lighting (§ 516.42); commercial lighting of historical significance (§ 516.43); safety of persons and property (§ 516.44); time to install substitute lighting (§ 516.45); substantial expense (§ 516.46); public interest (§ 516.47).

§ 516.11 Definitions

Unless otherwise expressly provided, for the purposes of this rule:

(a) The term "direct industrial customer" means an industrial user of natural gas who obtains the natural gas under a contract with a natural gas pipeline company, or any agent thereof.

(b) The term "local distribution company" means any person engaged in the business of interstate or intrastate transportation and local distribution of natural gas for ultimate consumption.

(c) The term "natural gas" means any fuel consisting in whole or in part of natural gas, liquid petroleum gas, or synthetic gas derived from petroleum or natural gas liquids.

(d) The term "natural gas outdoor lighting fixture" means a complete stationary natural gas outdoor lighting unit.

(e) The term "pipeline company" means any person engaged in the business of interstate or intrastate transportation of natural gas by pipeline other than as a local distribution company.

(f) The term "residence" means any single or multiple family dwelling unit, including commonly held areas associated with such unit and including multiple family dwelling units which may be classified by the local distribution company as "commerical" customers.

(g) Unless otherwise designated by ERA, upon recommendation of the Governor, the term "State regulatory authority" means that agency of any of the 50 States, the District of Columbia, Puerto Rico, or any territory or possession of the United States, which has primary or exclusive authority to fix, modify or approve rates for the sale of natural gas by local distribution companies within that State, except that:

(1) In the case of a local distribution company which is publicly-owned, and not subject to State rate regulation, references in this part to "State regulatory authority" or "State" shall be treated as references to such company; and

(2) In the case of any direct industrial customer or any local distribution company which is privately-owned, and not subject to State rate regulation, the Governor shall designate the responsible State regulatory authority.

(h) The term "substitute lighting" mean outdoor lighting which does not directly burn natural gas.

(i) The term "residential outdoor lighting fixture" means a natural gas outdoor lighting fixture which was installed prior to, and was in service in connection with a residence on November 9, 1978.

[44 FR 27607, May 10, 1979, as amended at 45 FR 35208, May 23, 1980]

Subpart B—Prohibitions

§ 516.20 General prohibition on installation of natural gas outdoor lighting fixtures.

(a) *Prohibition.* No local distribution company or direct industrial customer shall install any natural gas outdoor lighting fixture.

(b) *Effective date.* The prohibition stated in paragraph (a) of this section shall be effective beginning on November 9, 978.

§516.21 General prohibition on sale of natural gas for use in outdoor lighting.

(a) *Prohibition.* No local distribution company shall supply natural gas for use in any outdoor lighting fixture except for residential outdoor lighting fixtures, as that term is defined in §516.11(i).

(b) *Effective dates.* The prohibition stated in paragraph (a) of this section shall be effective on the following dates:

(1) For any industrial or commercial fixture to which natural gas was supplied for outdoor lighting use on November 9, 1978, *November 5, 1979.*

(2) For any municipal outdoor lighting fixture to which natural gas was for outdoor lighting use on November 9, 1978, *January 1, 1982.*

§516.22 Prohibition on use of natural gas by direct industrial customers for outdoor lighting.

(a) *Prohibition.* No direct industrial customer shall use natural gas for outdoor lighting.

(b) *Effective dates.* (1) In the case of a direct industrial customer who was using natural gas for outdoor lighting on November 9, 1978, the prohibition stated in paragraph (a) of this section shall be effective on November 5, 1979.

(2) In the case of a direct industrial customer using a natural gas outdoor lighting fixture(s) that:

(i) Was installed prior to the ban on the installation of such fixture(s) set out in § 516.20 of this rule; and

(ii) Was not using natural gas for such fixture(s) on the date this rule is issued as a final rule.

The prohibition stated in paragraph (a) of this section shall be effective on May 8, 1979.

Subpart C—Delegation of Authority

§ 516.30 Scope.

Pursuant to section 402(e) of the Act, ERA delegates to the appropriate state regulatory authorities, effective on the date this rule is issued as a final rule, the full responsibility and authority of the Secretary of Energy with regard to natural gas outdoor lighting. The authorities and responsibilities delegated by this rule to the appropriate state regulatory authorities acceptance of which is at the states' discretion, are those enumerated in paragraphs (a) through (h) of this section. The appropriate State regulatory authorities should normally consult with the State Historic Preservation Officers for their respective States (as recognized by the U.S. Department of Interior, Heritage Conservation and Recreation Service) when fulfilling their responsiblities and authorities as set forth in this section particularly when decisions are made or options considered relating to historic preservation.

(a) *Authority to promulgate regulations.* The authority to promulgate any regulations necessary to carry out the purposes of section 402 of the Act is delegated to the appropriate State regulatory authorities.

(b) *Authority to issue orders.* The authority to issue orders exempting certain natural gas outdoor lighting fixtures from the prohibitions set forth in Subpart B of this rule is delegated to the appropriate State regulatory authorites. Such exemption orders may be issued on the basis of:

(1) Lighting of historical significance;
(2) Memorial lighting;

(3) Commercial lighting of historical significance;

(4) Lighting which is necessary to protect the safety of persons and property;

(5) The necessity to permit the installation of substitute lighting where no adequate outdoor lighting (other than that using natural gas) existed on November 9, 1978;

(6) Substantial expense which would not be cost justified; or

(7) The public interest and consistency with the purposes of the Act.

(c) *Authority to establish exemption criteria.* The authority to establish criteria to be used in making any determinations to issue any orders relating to exemptions from the prohibitions set forth in Subpart B of this rule is delegated to the appropriate State regulatory authorities.

(d) *Authority to establish exemption procedures.* The authority to establish procedures for the acceptance processing, consideration, and grant or denial of applications and requests for exemptions from the prohibitions set forth in Subpart B of this rule is delegated to the appropriate State regulatory authorities.

(e) *Authority to establish enforcement mechanisms.* The authority to establish enforcement policies, criteria and procedures with respect to the prohibitions set forth in Subpart B of this rule is delegated to the appropriate State regulatory authorities.

(f) *Authority to enforce prohibitions and assess civil penalties.* The authority to enforce prohibitions set forth in Subpart B of the rule, including the authority to assess civil penalties for noncompliance with such prohibitions pursuant to section 723(c) of the Act, is delegated to the appropriate State regulatory authorities.

(g) *Authority to investigate.* The authority to initiate investigations and compel the submission of data or

relevant documents is delegated to the appropriate State regulatory authorities.

(h) *Authority to receive customer notification reports.* The authority to receive reports concerning the method selected by local distribution companies for periodic notification of their customers under §§516.52.

§ 516.31 Annual reports.

(a) *General requirements.* Pursuant to this delegation, the appropriate State regulatory authority shall submit to ERA two copies of the annual report as specified in this section. The annual report shall be submitted to: Economic Regulatory Administration, U.S. Department of Energy, Office of Utility Systems, 2000 M Street, NW., Washington, D.C. 20461, Attention: Gas Light Prohibitions.

(b) *Schedule for submission.* The appropriate State regulatory authority shall submit annually to ERA, by January 1 of each year, beginning no later than January 1, 1980, a report as specified in this section, except as provided for in paragraph (d) of this section. The last annual report shall be submitted by January 1, 1984. The appropriate State regulatory authority shall submit the annual report either separately or together with the "PURPA Annual Report on Gas Utilities" required to be submitted to DOE by November 1 of each year pursuant to requirements established by section 309 of the Public Utility Regulatory Policies Act of 1978, 92 Stat. 3117 (Pub. L. 94-617).

(c) *Contents of report.* (1) The first annual report shall contain all of the elements specified in paragraph (2) of this paragraph (c). Subsequent reports shall contain only those elements or portions of elements to which there were significant changes since the last annual report was submitted.

(2) The appropriate State regulatory authority shall include in their report the following elements:

(i) A list of all local distribution companies and all

direct industrial customers who use natural gas for outdoor lighting covered by the report;

(ii) Current estimated annual natural gas consumption for the local distribution companies and all direct industrial customers covered by the report attributable to outdoor lighting;

(iii) Copies of all State statutes, rules and regulations prohibiting natural gas lighting, enforcing the prohibitions, and granting or denying exemptions to the prohibitions;

(iv) A summary of exemption requests granted or denied, by category of exemption, and including the rationale for such grant or denial; and

(v) A description of the State's current or projected efforts to enforce the prohibitions set forth in Subpart B of this rule.

(d) *Optional certification of submission of final report.* An appropriate State regulatory authority may submit to ERA a certification stating that, to the best knowledge of such authority, further annual reports are unnecessary, stating the rationale for such determination. The certification must be submitted prior to the date on which the annual report is due. ERA shall be the sole determinant, however, as to whether or not annual reports are required.

§ 516.32 Recission.

This delegation as it applies to any particular State may be rescinded by ERA if, after notice and opportunity for a hearing, ERA finds that the State regulatory authoirty has failed to comply with any substantial provision of section 402 of the Act or this rule. Such finding and rescission shall be published in the FEDERAL REGISTER, and shall become effective no sooner than 15 days after the date of publication.

Subpart D—Guidance on Exemptions

§ 516.40 Applicability.

The appropriate State regulatory authority shall grant or deny a request for exemption on the basis of the

guidance specified in this subpart until such time as the appropriate State regulatory authority chooses to exercise the authority to establish exemption criteria, delegated by § 516.30(c) of this rule.

§ 516.41 Lighting of historical significance.

(a) *Scope.* A Federal, State or local government agency, or an appropriate historical association, may petition the appropriate State regulatory authority for an exemption from the prohibitions set forth in §§ 516.20 and 516.21 of this rule for any property on the basis of historical significance. In the case of a petition for an exemption from the prohibition set forth in § 516.20 of this rule (General prohibition on installation of natural gas outdoor lighting fixtures), an exemption shall be granted only for replacement of a natural gas outdoor lighting fixture(s) that was installed prior to November 9, 1978. Such replacement shall include:

(1) Replacement of an extant original or reporduction fixture; or

(2) Installation of an original or reproduction fixture to replace a fixture which existed during the life of the specified historic property.

(b) *Criteria.* The criteria for an exemption on the basis of historic significance shall be satisfied upon certification, by the petitioner, that the specifically identified natural gas outdoor lighting fixture(s) directly contributes to the quality of significance of the specifically identified historic property or district, as applicable; and upon a finding that the specifically identified historic property:

(1) Is listed on the National Register of Historic Places maintained by the Heritage Conservation and Recreation Service, Department of Interior, or is officially determined eligible for listing by the Secretary of Interior, pursuant to the National Historic Preservation Act (16 U.S.C. 470 as amended), applicable regulations (36 CFR Parts 60 and 63), and Executive Order 11593; or

(2) Is in a district whose State or local statutes are certified as providing adequate protection of historic places by the Secretary of the Department of Interior, pursuant to the Tax Reform Act of 1976 (26 U.S.C. 191, 280B) and applicable regulations.

(c) *Stays.* An exemption request shall result in a stay from the prohibitions set forth in Subpart B of this rule if:

(1) The petitioner has certified that the specifically identified natural gas outdoor lighting fixture(s) directly contributes to the quality of significance of the specifically identified historic property or district, as applicable; and

(2) An application is pending, before the Department of Interior, for inclusion in one of the categories specified in paragraph (b)(1) or (2) of this section.

§ 516.42 Memorial lighting.

(a) *Scope.* A Federal, State or local government agency, or an appropriate historical association, may petition the appropriate State regulatory authority for an exemption from the prohibitions set forth in §§516.20 and 516.21 of this rule on the basis of memorial lighting. In the case of a petition for an exemption from the prohibition set forth in § 516.20 of this rule (General prohibition on installation of natural gas for outdoor lighting fixtures), an exemption shall be granted only for replacement of a natural gas outdoor lighting fixture(s) that was installed prior to November 9, 1978. Such replacement shall include replacement of an extant fixture only.

(b) *Criteria.* The criteria for an exemption on the basis of memorial lighting shall be satisfied upon a finding that the specifically identified outdoor lighting fixture(s) directly contributed to preserving the memory of a deceased person or persons.

§ 516.43 Commercial lighting of a traditional nature.

(a) *Scope.* A person using natural gas for outdoor lighting which is used for commercial purposes and which is of a traditional nature and conforms with the cultural or architectural style of the area in which it is located, may petition for an exemption from the prohibitions set forth in §§ 516.20 and 516.21 of this rule. In the case of a petition for an exemption from the general prohibition on installation of natural gas outdoor lighting fixtures (§ 516.20), an exemption shall be granted only to replace a natural gas outdoor lighting fixture(s) which had been installed prior to November 9, 1978. Such replacement shall include:

(1) replacement of an existing natural gas light; or

(2) replacement of a natural gas light which does not presently exist but which existed at some previous time upon the specified property.

(b) *Criteria.* The criteria for an exemption on the basis of commercial lighting of a traditional nature shall be satisfied upon certification by the petitioner that the specifically identified natural gas outdoor lighting fixture(s), which is used for commercial purposes and which is of a traditional nature and conforms with the cultural or architectural style of the area in which such light is located, presently exists or will be used to replace a natural gas lighting fixture of a traditional nature.

(c) *Stays.* An exemption request shall result in a stay from the prohibitions set forth inSubpart B of this rule if the petitioner has certified that the specifically identified natural gas outdoor lighting fixture(s) used for commercial purposes:

(1) Is of a traditional nature and conforms with the cultural or architectural style of the area in which such light(s) is located, and

(2) Presently exists or will be used to replace a natural gas lighting fixture of a traditional nature.

[45 FR 35208, May 23, 1980]

§ 616.44 Safety of persons and property.

(a) *Scope.* A local distribution company, a direct industrial customer, or an interested person, may petition the appropriate State regulatory authority for an exemption from the prohibitions set forth in §§516.21 and 516.22 of this rule on the basis of the necessity to protect the safety of persons and property if such natural gas was being supplied on November 9, 1978.

(b) *Criteria.* The criteria for an exemption on the basis of necessity to protect the safety of persons and property shall be satisfied upon a demonstration that an exemption for the natural gas fixture(s) is essential:

(1) To prevent an increase in the likelihood of bodily injury or damage to property;

(2) To prevent an increase in the likelihood of the occurrence of crime in the location served by the light; or

(3) Because other existing lighting in the location does not provide lighting adequate to insure confirmance with American National Standards Institute (ANSI) Standard No. D 12.1, "The American, National Standard Practice for Roadway Lighting."

[44 FR 27607, May 10, 1979, as amended at 45 FR 35209, May 23, 1980]

§ 516.45 Time to install substitute lighting.

(a) *Scope.* A local distribution company, a direct industrial customer, or an interested person, may petition the appropriate State regulatory authority for a temporary exemption from the prohibitions set forth in §§ 516.21 and 516.22 of this rule. Such an exemption shall be on the basis of the time needed to permit the installation of substitute lighting where no adequate outdoor lighting (other than that using natural gas) exists, if such natural gas was being supplied on November 9, 1978.

(b) *Criteria.* The criteria for an exemption on the basis of time to install substitute lighting shall be satisfied upon a finding that:

(1) No adequate outdoor lighting (other than that using natural gas) is available at the time the applicable prohibition became effective; and

(2) The time required for installation of the substitute lighting will not extend beyond one year from the date the applicable prohibition became effective, unless facts and circumstances warrant a longer period.

§ 516.46 Compliance which entails substantial expense and would not be cost justified.

(a) *Scope.* A local distribution company, a direct industrial customer, an individual user or an interested person may petition for an exemption from the prohibitions set forth in §§ 516.21 and 516.22 of this rule on the basis that compliance with the prohibitions entails substantial expense and would not be cost justified, if the natural gas at issue was being supplied on November 9, 1978.

(b) *Criteria.* The criteria for an exemption on the basis of substantial expense shall be satisfied upon a showing by the petitioner that compliance with the prohibitions in § 516.21 or § 516.22 of this rule would:

(1) Entail substantial expense; and

(2) That such expense would outweigh the benefits to be derived from compliance.

[45 FR 35209, May 23, 1980]

§ 516.47 Public Interest.

(a) *Scope.* A local distribution company, a direct industrial customer, or an interested person, may petition the appropriate State regulatory authority for an exemption from the prohibitions set forth in

§§ 516.21 and 516.22 of this rule on the basis of the public interest and consistency with the purposes of this Act, if such natural gas was being supplied on November 9, 1978.

(b) *Criteria.* The criteria for an exemption on the basis of the public interest and consistency with the purposes of the Act shall be satisfied upon a finding that converting a specific natural gas outdoor lighting fixture(s) to substitute lighting would not reduce the use of natural gas.

Subpart E—Outdoor Natural Gas Lights—Customer Notification; Reporting Procedures

§516.51 Notification of amount and annual cost of natural gas used in outdoor lights.

(a) Each local distribution company subject to the prohibitions of section 402 (a) and (b) of FUA which has natural gas outdoor lighting fixtures attached to its system shall:

(1) No later than May 31, 1982, select a method for periodically informing its customers of the amount of natural gas used by a typical natural gas outdoor lighting fixture in the company's system, as determined by the company, and the annual cost of the natural gas so used; and

(2) Within one year from the date on which the notification method is reported to the appropriate state regulatory authorities in accordance with § 516.52, give the initial customer notification, using the method so selected. The notification shall thereafter be given annually.

(3) Any local distribution company which experiences difficulty in selecting its customer notification method may obtain a reasonable extension of the May 31, 1982 deadline from the appropriate State regulatory authority upon the showing of good cause.

(b) The method to be used in the customer

notification required by paragraph (a) of this section, shall be selected by each affected local distribution company, and shall be reasonable and simple, as viewed in the context of the company's routing operating procedures.

§516.52 Customer notification reports.

(a) No later than May 31, 1982, each local distribution company required to give customer notification under § 516.51(a), shall report the method selected to the state regulatory authority designated by the governor to administer the outdoor natural gas lighting program for the area in which the distributor is located, under the delegation of authority in Subpart C of this part.

(b) No later than May 31, 1982, each local distribution company not required to give customer notification under § 516.51(a) by reason of the fact that it has no natural gas outdoor lighting fixtures attached to its system shall report this fact to the State regulatory authority designated by the governor to administer the outdoor natural gas lighting program for the area in which the distributor is located, under the delegation of authority in Subpart C of this part.

(c) Local distributing companies given extensions in the May 31, 1982 deadline for selection of a customer notification method under § 516.51(a)(3), above, shall report the method selected to their State regulatory authority in accordance with the terms of such extension.

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No. 81-2325

In the Supreme Court of the United States

OCTOBER TERM, 1982

ATLANTA GAS LIGHT COMPANY, PETITIONER

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

KATHRYN A. OBERLY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals properly concluded that petitioner's claim that provisions of the Powerplant and Industrial Fuel Use Act of 1978 that restrict the use of natural gas in outdoor lighting and regulations issued thereunder are unconstitutionally vague was not ripe for adjudication.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-2 to A-25) is reported at 666 F. 2d 1359.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-25) was entered on February 1, 1982. The order of the court of appeals denying rehearing was entered on March 22, 1982. The petition for a writ of certiorari was filed on June 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 9, 1978, the President signed into law five statutes collectively known as the National Energy Act. The Powerplant and Industrial Fuel Use Act of 1978 ("Fuel Use Act" or "FUA"), Pub. L. No. 95-620, 92 Stat. 3289, 42 U.S.C. (Supp. IV) 8301 *et seq.*, a provision of which is at

issue in this proceeding, is one of those five statutes.[1] The Fuel Use Act was enacted, *inter alia*, to reduce the importation of petroleum and increase the Nation's capability to use its indigenous energy resources, to conserve natural gas and petroleum for uses for which there are no feasible alternative fuels, to encourage the greater use of coal and other alternate fuels as primary energy sources, to ensure that adequate supplies of natural gas are available for essential agricultural uses, and to reduce the vulnerability of the United States to energy supply interruptions. Section 102(b), 42 U.S.C. (Supp. IV) 8301(b). The primary strategy chosen by Congress to pursue these goals was to prohibit the use of natural gas and petroleum as a primary energy sources in any new electric powerplant or major fuel burning installation (MFBI) and to require the conversion of existing electric powerplants and MFBIs to coal or other alternate fuels. In addition, to advance the purposes of the Act, Congress restricted the use of natural gas in outdoor lighting. Section 402, 42 U.S.C. (Supp. IV) 8372. It is this last section of the Fuel Use Act, and the regulations promulgated thereunder, that petitioner has challenged.

2. Section 402(a) banned the installation of new outdoor natural gas lighting fixtures effective November 9, 1978. 42 U.S.C. (Supp. IV) 8372(a). In addition, Section 402(b) required the Secretary of Energy to promulgate rules prohibiting natural gas distribution companies, such as petitioner, from providing natural gas service for use in outdoor lighting. 42 U.S.C. (Supp. IV) 8372(b). As originally enacted, the statute provided that the Secretary was to

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[1]The other statutes are the National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat 3206 *et seq.*; the Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174 *et seq.*; the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 *et seq.*; and the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 *et seq.*

promulgate the service prohibition rule not later than 180 days after November 9, 1978, and that the prohibition take effect upon promulgation except in the case of gas lights already receiving gas service on the effective date of the Act. Congress established a schedule for phasing out service to outdoor gas lights in place on the effective date of the Act, prescribing varying periods of permissible continued service depending upon the class of outdoor lighting involved. *Ibid.* By Section 1024(a) of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 617, Congress amended Section 402(b) to provide a permanent grandfather exemption from the service prohibition for residential outdoor lighting fixtures that were installed prior to the effective date of the Act and were receiving natural gas service on that date.

Section 402 also directed the Secretary to grant various exemptions from both the installation and service prohibitions. Section 402(c), 42 U.S.C. (Supp. IV) 8372(c). Mandatory and permanent exemptions were to be established for memorial lights or lights of historical significance, and for natural gas outdoor lighting used for commercial purposes, if it was of a traditional nature and conformed to the cultural or architectural style of the area in which the light was located. The Act also authorized the Secretary to grant exemptions from the service prohibition whenever he found that an exemption was necessary to protect the safety of persons or property or necessary to permit the installation of substitute lighting, where compliance with the prohibition would entail substantial expense and would not be cost justified, or where an exemption was in the public interest and consistent with the purposes of the statute. Natural gas distribution companies, such as petitioner, are among those persons specifically authorized by statute to seek discretionary exemptions. Section 402(c)(3), 42 U.S.C. (Supp. IV) 8372(c)(3). Finally, Section 402(e), 42 U.S.C. (Supp.

IV) 8372(e), authorized the Secretary to delegate his responsibility and authority for outdoor lighting to appropriate state regulatory authorities.

3. In May 1979, the Secretary issued the required regulations, including general prohibitions on the installation of outdoor gas lights and the sale of natural gas for use in outdoor lighting. 44 Fed. Reg. 27606 (1979), codified at 10 C.F.R. Part 516. The Secretary's regulations also delegated to the states the Secretary's "full responsibility and authority" for the program. 10 C.F.R. 516.30. The responsibilities delegated included the authority to promulgate regulations needed to carry out the purposes of the statute; the authority to issue orders granting exemptions; the authority to establish criteria to be used in making exemption determinations; the authority to establish procedures for the processing of exemption requests; the authority to establish enforcement policies, criteria and procedures; and the authority to enforce the prohibitions, including the authority to assess civil penalties. *Ibid.* The regulations provide that the delegation of authority to a state may be rescinded if, after notice and opportunity for a hearing, the Secretary finds that a state regulatory authority has failed to comply with any substantial portion of Section 402 or the regulations promulgated thereunder. 10 C.F.R. 516.32.

The Secretary's regulations also provided guidance on exemptions to be used by state regulatory authorities until such time as they chose to exercise their authority to establish their own exemption criteria. 10 C.F.R. 516.40 through 516.47.[2] Although petitioner originally argued that the delegation to the state regulatory authorities was mandatory, the Secretary's position has always been that acceptance of the delegation was discretionary with each state;

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[2]In May 1980, these guidance regulations were amended in respects not material to this litigation. 45 Fed. Reg. 35206 (1980).

that point was made explicit in a recent amendment to the regulations. 47 Fed. Reg. 23436, 23438 (1982), to be codified at 10 C.F.R. 516.30. Of the nation's public utility regulatory authorities only the Texas Railroad Commission has declined to accept the delegation. The Secretary has specified precisely the limited authorities retained by the federal government (47 Fed. Reg. 23437 (1982)):

> (a) The authority to administer all aspects of the natural gas outdoor lighting program where the appropriate State regulatory authorities have not accepted the delegation or where the delegation has been rescinded pursuant to 10 C.F.R. 516.32;
>
> (b) The authority to administer any aspect of the program where the appropriate State regulatory authority operating under the delegation indicates to [the Secretary] it is unable or incapable of administering; and
>
> (c) Any authority affecting natural gas outdoor lighting granted by future amendments or successor statutes to FUA, in which the Secretary of Energy is directed to perform specified activities, without there also being present an indication that Congress intended the delegation of the responsibility for such activity to the States or the reasonable latitude in the wording of the statute that would permit such an interpretation.

4. In the court below, petitioner raised broad constitutional challenges to the facial validity of Section 402.[3] Petitioner argued that Section 402 exceeds the constitutional power of Congress to regulate commerce and violates the

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[3]Petitions for review of the Secretary's regulations implementing Section 402 were also filed by Laclede Gas Company, the America Gas Association ("AGA"), and Entex, Inc. Those parties have not sought review in this Court, although AGA has filed a response supporting the petition.

Fifth and Tenth Amendments to the Constitution. For its Commerce Clause and Tenth Amendment arguments, petitioner relied primarily on this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Petitioner's Fifth Amendment argument was essentially that the statute and regulations were unconstitutionally vague because compliance with the federal prohibitions against providing gas service for outdoor lighting might place distribution companies in violation of state laws regarding continuation of service. Without guidance—said to be lacking in the regulations—on how to comply with these assertedly conflicting obligations, petitioner contended, the statute and regulations were unworkable and void for vagueness.

5. The court of appeals considered and rejected petitioner's Commerce Clause and Tenth Amendment arguments. The court held that although the distribution of natural gas is essentially a local activity, it nevertheless has substantial ramifications for, and effects upon, interstate commerce (Pet. App. A-14 to A-17). The court also concluded that Congress had a rational basis for determining that the distribution of natural gas for use in outdoor lighting affects interstate commerce, relying on legislative history showing that even small savings of natural gas could benefit industries engaged in interstate commerce (*id.* at A-17 to A-18). Finally, the court held that Section 402's prohibitions were reasonably adapted to the goal of conserving natural gas (*id.* at A-18 to A-19).

Applying the test enunciated in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S.C. 264, 287-288 (1981), the court of appeals also rejected petitioner's Tenth Amendment challenge. The court noted that the Fuel Use Act is not directed to the "States as States," but instead regulates the wholly private natural gas distribution industry. The court disagreed with petitioner's contention that the Secretary's delegation of his authority to the states

was mandatory; instead, the court found that the states "remain free to reject the delegation and thereby refuse to enforce the regulations." Pet. App. A-22. Thus, the court found coercion of the states to be lacking.

Finally, the court of appeals declined to consider petitioner's Fifth Amendment arguments, holding that, in the absence of a specific challenge to state regulations implementing the program, petitioner's claims of impermissible vagueness were not ripe. The court explained (Pet. App. A-24 to A-25):

> Congress and the Department of Energy clearly intended that the states be the primary regulators under the Fuel Use Act. Yet the petitioners in the present case challenge on due process grounds only the federal statute and implementing regulations, making no claim whatsoever regarding the vagueness of a particular state's regulatory program. * * *
>
> The petitioners claim that they are uncertain as to how they must comply with the prohibitions in Section 402 * * *. In our opinion the claim is not ripe. There is no allegation that a particular state has indeed enacted a set of vague and uncertain rules. Neither is there any claim that a state has or will pass regulations holding a gas distribution company liable retroactively for violations occurring prior to the promulgation of the state rule. Presumably, a state could without overstepping its powers to establish exemption criteria under the federal regulation concerning delegation, exempt all pre-promulgation violators, thus leaving parties such as the petitioners in this case with no injury in fact.

ARGUMENT

1. In this Court, petitioner does not challenge the court of appeals' rulings under the Commerce Clause and Tenth Amendment. Petitioner now disputes only the court of

appeals' decision that its claims of vagueness and unworkability were not ripe for adjudication. The court of appeals' decision on this point was clearly correct and does not, as petitioner alleges, conflict with this Court's decision in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

We note, preliminarily, that petitioner seriously misstates (Pet. 11) the holding of *Abbott Laboratories*. The Court there held that pre-enforcement review of agency regulations would be barred either if the relevant statutory scheme precluded such review (see 387 U.S. at 139-148), or if the controversy was not ripe for judicial resolution (see 387 U.S. at 148-156). In determining whether a controversy is ripe, the Court directed, attention is to be focused upon two factors: fitness of the issues for judicial decision in the current posture of the case, and any hardship to the parties of withholding consideration. 387 U.S. at 149. The Court plainly did not hold, as petitioner states, that pre-enforcement review must be allowed unless it is shown that the applicable statute precludes review as well as that the issues are ones unfit for judicial review and that the regulations had no direct impact upon the challenging party. Because the court of appeals below held that the claim presented by petitioner is unripe, petitioner's argument (Pet. 11, 15) that the statute specifically authorizes pre-enforcement review is beside the point. As the Court made clear in *Abbott Laboratories* (387 U.S. at 148), lack of ripeness and statutory preclusion are independent barriers to review. The Court's discussion of ripeness, moreover, squarely supports the decision of the court of appeals below.

In *Abbott Laboratories*, the regulation held to be ripe for pre-enforcement review was complete unto itself, requiring drug manufacturers immediately to change their labeling practices or risk noncompliance with the regulation. See 387 U.S. at 151-154. Here, by way of contrast, petitioner has

never brought before any court facts sufficient to determine the impact of the federal service prohibition regulations on petitioner's operations. The impact of those regulations remains completely unknown in the absence of any information about the implementing program of the State of Georgia.[4] Petitioner is not threatened with *federal* enforcement action because the Secretary's enforcement responsibilities have been delegated to the State of Georgia, and the Secretary did not retain residual or dual enforcement authority at the federal level.[5] Only in the event that the delegation to Georgia is at some time in the future rescinded is it even possible that petitioner might be faced with federal prosecution. And petitioner does not suggest, nor is it plausible to assume, that any future reversion of authority to the federal government would result in federal prosecution for violations that occurred during the time the delegation was in effect.[6]

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[4]Petitioner, by its own description, is "a local distribution company with its principal place of business in Atlanta, Georgia. Atlanta Gas serves about 770,000 customers in the State of Georgia and is subject to regulation by the Georgia Public Service Commission." Brief of Joint Petitioners Atlanta Gas Light Co., Nos. 79-2568 *et al.*, filed in the court below, at page 3. Thus, it is of no legitimate concern to petitioner that the Texas Railroad Commission has declined to accept the Secretary's delegation (Pet. 10).

[5]In its brief in support of the petition, the American Gas Association argues that the statute does not authorize the Secretary to delegate his enforcement responsibilities to the states. Since the issue is not raised by petitioner, the Court need not consider it. It is ironic indeed for AGA to advance this argument in light of its comments on the Secretary's rulemaking: "A.G.A. supports the delegation of authority to establish enforcement policies and assess civil penalties to the States" (R. 70; "R." denotes the administrative record filed in the court of appeals).

[6]The remoteness of any possibility of federal enforcement here distinguishes *Abbott Laboratories*. There the Court concluded that the requirement that any enforcement action under the Food and Drug Administration regulations at issue proceed through the offices of the Attorney General did not meaningfully shield persons subject to the

As for the "threat" of state prosecution, the court of appeals was surely correct in declining to decide the constitutionality of a state program about which it had no information. Petitioner has never alleged that Georgia has adopted unreasonable enforcement policies or has in any way threatened enforcement action against petitioner. For that matter, petitioner does not even reveal whether it has ever applied to the Georgia authorities for exemptions from the service prohibitions that might, if granted, significantly alter the effect of the statute's prohibitions on petitioner's business operations. Without such information, any decision by the court of appeals could be no more than an ill-informed advisory opinion. The court of appeals' refusal to be drawn into such a speculative dispute does not merit review by this Court; it is fully consistent with this Court's decision in *Abbott Laboratories*. Moreover, unlike the situation in *Abbott Laboratories*, which involved only the question of a regulation's consistency with the underlying statute, petitioner here seeks resolution of *constitutional* questions in a factual vacuum. This Court's decision in *W.E.B. DuBois Clubs* v. *Clark*, 389 U.S. 309, 311-313 (1967), and *Poe* v. *Ullman*, 367 U.S. 497 (1961) (opinion of Frankfurter, J.), *id.* at 509 (opinion of Brennan, J.), fully support the court of appeals' refusal to undertake such a premature constitutional adjudication.

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regulations from the direct impact of the regulations, because there was no suggestion that the Attorney General would fail to seek criminal and civil sanctions for violations of the regulations. 387 U.S. at 151-152. The Court also stressed that the "agency does have direct authority to enforce th[e] regulation" challenged in administrative proceedings. Here, by contrast, the Secretary of Energy has, under the very regulations challenged, transferred his full authority and responsibility with regard to natural gas outdoor lighting entirely outside the federal government; the division of authority effected plainly is not a "mere technicality." Compare *Abbott Laboratories, supra*, 387 U.S. at 152.

2. In any event, petitioner's due process challenge to the statute and federal regulations has no merit. Petitioner contends that the absence of enforcement or compliance guidelines forces a gas distribution company to choose between obeying the statutorily-mandated prohibitions against service and violating unspecified state laws that allegedly prohibit the termination of service. But federal compliance guidelines are neither constitutionally nor statutorily required.

Any federal law that regulates conduct that is also within the province of permissible state regulation raises the possibility that the persons affected will be confronted with conflicting state and federal mandates. To the extent that any conflict is, in fact, irreconcilable, it is also certain, under the Supremacy Clause, that the state law cannot be enforced. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-526 (1977); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963). Congress is not constitutionally bound, however, to determine, before it enacts any law, each and every respect in which its enactment might contradict the law of a state and how every conflict is to be resolved. Indeed, it is beyond the power of Congress—and surely of the Secretary of Energy—to do so. "Congress is vested with the legative power of the United States, and not the judicial power * * *." *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141, 151 (1979) (Rehnquist, J., concurring).

Contrary to petitioner's contentions (Pet. 13-15), it is hardly self-evident, and the record of this proceeding surely does not establish, that natural gas distributors are required by Section 402 to do the physically or legally impossible. Petitioner does not deny that there are gas lights on the companies' side of gas meters as to which the petitioner has full control, and natural gas companies enjoy easements that may enable them to accomplish what Section 402

requires. Section 402 is not invalid because hypothetical cases exist in which enforcement would be problematic. And there has been no showing that the states lack the ability to adapt their regulatory and enforcement programs to the realities of utility service. Indeed, the expansive delegation of authority to the state authorities no doubt rests upon Congress' belief that they were best equipped to make such accommodations as might be necessary. See H.R. Rep. No. 95-1749, 95th Cong., 2d Sess. 89 (1978). The public utility regulatory agencies are assuredly better situated to make such judgments than the court of appeals, or this Court. Because the challenged regulations do not authorize enforcement prior to establishment of a state regime for implementing the Act, petitioner is not, so far as the record shows, subject to any prospect of enforcement of impermissibly vague obligations. Plainly there can be no constitutional requirement for the promulgation of a federal enforcement policy in these circumstances.

Nor does the statute itself require promulgation of enforcement guidelines. With respect to the outdoor lighting prohibitions, Section 402 specifically sets forth the matters that the Secretary might treat in the regulations he issues under that section: certain prohibitions under Section 402(b)(1) and (2), and certain exemptions under Section 402(b)(3). Neither Section 402, nor Section 723(c), 42 U.S.C. (Supp. IV) 8433(c), which provides civil penalties for violations of Section 402, requires that the Secretary issue general guidance concerning the relationship of state and federal law.

Petitioner would extract a duty to issue enforcement guidelines from the language of the conference report, H.R. Rep. No. 95-1749, *supra*. The report states (*id.* at 89):

> The conferees intend that the Secretary's enforcement of civil penalties be reasonable. For instance, lights that are located on the users [*sic*] side of the meter, and are not visible from the street present problems to a company in enforcing the ban. Similarly, a light that was turned off by the company, and later reconnected by the residential user may be difficult to detect. The Secretary should provide some guidelines.

Although this language surely indicates the conferees' policy view that "some guidelines" are desirable, it falls far short of establishing a statutory duty to issue particular federal guidelines. Congress conspicuously omitted the requirement for guidelines from the Fuel Use Act and, in contrast to the specific requirements of Section 402, the general exhortation in this passage does not clearly describe what, if anything, is expected of the Secretary.

The Act leaves the Secretary discretion to determine whether, and in what form, enforcement guidelines would be appropriate. In deciding not to issue guidelines for the time being, the Secretary could legitimately consider that only one regulatory authority in the nation has declined his delegation, that no other state has requested guidelines, that at least 21 states already had outdoor lighting programs, including enforcement procedures, in effect at the time when the Secretary promulgated his regulations, and that the legislative history of the Fuel Use Act itself provides general guidance with respect to the assertedly problematic cases with which petitioner is concerned.[7] The conference

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[7]Nothing in the legislative history upon which petitioner relies suggests that, in the event that administration of the outdoor gas lighting program was delegated to the states, enforcement policy should nonetheless be supplied by the Secretary. Significantly, the National Association of Regulatory Utility Commissioners (NARUC) testified before the Department of Energy that "[t]he fair and equitable administration

report, as quoted above, stated in connection with such cases, "The conferees intend that the Secretary's enforcement of civil penalties be reasonable." Senate floor debate on the conference report provides even more concrete evidence concerning the steps that gas companies are expected to take toward compliance, and the enforcement policy that Congress anticipated. See 124 Cong. Rec. 21119-21120 (1978) (colloquy between Senators Danforth and Ford). The Secretary accordingly had discretion to determine that, in view of the highly varied circumstances to which enforcement guidelines would have to apply in the states, no formal federal guidelines are now required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

KATHRYN A. OBERLY
Attorney

AUGUST 1982

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and enforcement of this program is best accomplished by the State Utility Commissions—agencies which are acutely aware of the conflicting interests that will result from this program" (R. 338).

Office - Supreme Court, U.S.
FILED
JUL 2 1982
ALEXANDER L. STEVAS, CLERK

No. 81-2325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ATLANTA GAS LIGHT COMPANY

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*

Respondent.

Response of Respondent American Gas Association In Support of Petition for Writ of Certiorari

JOHN A. MYLER
American Gas Association
1515 Wilson Boulevard
Arlington, Virginia 22209
(703) 841-8460

Attorney for Respondent

Counsel of Record

No. 81-2325

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JOHN A. MYLER
American Gas Association
1515 Wilson Boulevard
Arlington, Virginia 22209
(703) 841-8460

Attorney for Respondent

Counsel of Record

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No. 81-2325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ATLANTA GAS LIGHT COMPANY

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*

Respondent.

Response of Respondent American Gas Association In Support of Petition for Writ of Certiorari

The American Gas Association, pursuant to Rule 19.6 of the Supreme Court Rules, hereby supports the petition for a writ of certiorari filed by the Atlanta Gas Light Company[1] to review the February 1, 1982, decision of the United States Court of Appeals for the Eleventh Circuit in *Atlanta Gas Light Company, et al.*, v. *Department of Energy*, Nos. 79-2568, *et al.* The circuit court dismissed therein petitions for review of effective federal regulations by which the Secretary of Energy has established prohibitions against providing natural gas for use in outdoor lighting. The opinion is reported at 666 F.2d 1359 and is reprinted in Appendix A to the petition for writ of certiorari filed by Atlanta Gas Light Company. The regulations issued by the Secretary of Energy are published at 10 C.F.R. § 516 *et seq.* (1981). The listing of all member companies of the American Gas Association, their parents, subsidiaries and affiliates required by Rule 28.1 of the Supreme Court Rules is provided in Special Appendix A herein.

[1] *Atlanta Gas Light Company* v. *United States Department of Energy*, No. 81-2325.

STATEMENT OF THE CASE

The Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8301-8484 (Supp. IV 1980) (the 'Fuel Use Act') was established by Congress as a broad-ranging federal effort to reduce the importation of petroleum and increase the nation's capability to use indigenous energy resources. It was intended to promote conservation of petroleum and natural gas for uses without feasible alternatives. The use of natural gas as a primary energy source was prohibited or minimized in order to conserve gas to assure adequate supplies for appropriate uses.[2] The major thrust of the statute was against the use of natural gas or petroleum as a primary energy source in electric power-plants and major fuel-burning industrial installations. However, Congress included in the Fuel Use Act several additional prohibitions, of more limited impact, including that against provision of natural gas service for "use . . . for decorative outdoor lighting."[3]

This particular prohibition involves commercial service of natural gas for purposes which have long been of interest to individual states. Consequently, certain of the Secretary's responsibilities regarding outdoor lighting were allowed to be delegated to the states, i.e. the power to establish a prohibition against service of natural gas for use in outdoor lights and the power to grant exemptions from such prohibitions. While the statute is clear that only the Secretary has the authority to assess and collect civil penalties for noncompliance with such prohibitions, the Secretary's regulations attempt to delegate these duties to the states. Thus, the basic statutory framework of the Act provides a crucial insight into how the Secretary must implement the Act himself and what he can and cannot delegate to the states. He cannot delegate enforcement authority.

Title I of the Act contains general provisions, including legislative findings, statement of purpose, definitions, and territorial application of the Act. Titles II and III provide

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[2] 42 U.S.C. § 8301(b).

[3] Section 402, codified at 42 U.S.C. § 8372.

various prohibitions, and requirements and procedures for the granting of exemptions therefrom, against the use of natural gas or petroleum by "new" and "existing" powerplants and major fuel-burning industrial installations. Title IV provides additional prohibitions, including one against sale of natural gas for use in outdoor lighting, and grants to the President certain emergency authorities. Title V allows electric utilities owning powerplants the means of obtaining from the Secretary of Energy approval of a system-wide compliance plan. Title VI offers financial assistance for certain areas impacted by increased coal or uranium production and for certain powerplant acquisitions of air pollution control equipment.

Title VII provides the Secretary of Energy with certain powers and responsibilities for administration and enforcement of the entire Act. Subtitle A requires administrative procedure generally comporting with Section 553 of Title 5, United States Code, and provides for federal judicial review of final rules or orders prescribed by the Secretary. Subtitle B authorizes the Secretary to require reports and information from certain persons subject to the Act. The means of enforcement of the Act's provisions are provided specifically in Subtitle C, which requires a notice of violation to be provided by the Secretary to a person in violation of the Act, provides criminal and civil penalties, procedures for assessment and collection thereof, and allows injunctive relief and certain citizen suits. Section 723(c) provides a civil penalty of up to $500 (per day, per Section 723(a)) for each lighting fixture involved in a violation by any person of Section 402 of the Act, by providing gas service for use in outdoor lighting fixtures. Such penalty shall apply only to a violation by a person "who at the time of the violation had knowledge or reasonably should have had knowledge that the action involved was prohibited under Section 402." Section 723(c)(3).[4] Specific procedures for the assessment of any civil penalties under the Act to be followed by the Secretary are provided in Section 723(d).

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[4] 42 U.S.C. § 8433(c)(3).

The specific prohibition concerned in this case, Section 402 of the Act, is in two parts.[5] Section 402(a) prohibits the installation, by a local distribution company or certain industrial users of natural gas, of any outdoor lighting fixture using gas, which prohibition is not addressed by Atlanta Gas Light Company's petition. Section 402(b) directs the Secretary to prohibit by rule any local distribution company from providing natural gas service for use in outdoor lighting. Various effective dates are provided for the prohibition for residential, commercial, and industrial or municipal fixtures. Except for residential customers for whose fixtures natural gas was being provided for outdoor lighting use on the date of enactment of the Fuel Use Act, the prohibition is now in effect. The Secretary is authorized to exempt, from the prohibition against service provided in Section 402(b), distribution companies or users where such exemption is consistent with certain specified required findings (e.g., safety of persons or property) which are to be made under criteria established by the Secretary. Section 402(c).

The responsibility and authority of the Secretary with regard to outdoor lighting *under Section 402* may be delegated to the appropriate regulatory authority of a State if consistent with the purposes of Section 402. Section 402(e)(1). Such delegation shall be on terms and conditions prescribed by the Secretary and may be rescinded by the Secretary at any time. Section 402(e)(2).[6]

ARGUMENT

Pre-enforcement Review of the Secretary's Regulations Is Required to Provide Due Process of Law

The difficulties faced by local distribution companies attempting to comply with a ban on provision of natural gas for use in outdoor lighting fixtures were recognized clearly by Congress in consideration of the Act and a directive was

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[5] 42 U.S.C. § 8372.

[6] 42 U.S.C. § 8372(e).

issued to the Secretary to provide basic guideposts in order that distribution companies could act in such fashion as to comply with the law.

> The conferees intend that the Secretary's enforcement of civil penalties be reasonable For instance, lights that are located on the users [sic] side of the meter, and are not visible from the street may present problems to a company enforcing the ban. Similarly, a light that was turned off by the company, and later reconnected by the residential user, may be difficult to detect. The Secretary should provide some guidance.[7]

The Secretary has provided no guidance whatsoever, in spite of the problems recognized by Congress and articulated by distribution companies throughout the regulatory process required by FUA. Distribution companies typically do not, for instance, have the legal authority to enter upon a customer's premises except in accord with its state-regulated tariff. To enter the property without permission in order to terminate service to a gas light may subject the gas company to lawsuits for trespass or actions in tort. Furthermore, many gas companies operate under tariffs which do not authorize discontinuance of service unless the customer is using gas for an unlawful purpose. Because the federal prohibition is against service of gas, not use of gas, it is questionable whether discontinuance would comply with state law.

The circuit court declined to decide the due process questions presented, finding that until petitioners "can show that there presently exists a set of regulations so vague in their terms that reasonably intelligent persons would differ as to their meaning and application, then they have failed to establish a vagueness claim under the Fifth Amendment."[8] It is apparent, however, that the Secretary has the statutory authority to rescind the delegation "at any time" simply by providing notice thereof. Section 402(e)[9]. Clearly, the Secretary

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[7] H.R. Rep. No. 95-1749, 95th Cong., 2nd Sess. 89, reprinted in [1978] U.S. Code Cong. & Ad. News 8760, 8762.

[8] 666 F.2d at 1370.

[9] 42 U.S.C. § 8372(e)(2).

retains the authority to administer the program where a delegation was either not accepted or rescinded.[10] Just as clearly, neither the statute nor the Secretary's regulations exempt from liability action taken by distribution companies prior to a time when the compliance "guidance" directed by Congress has been provided, or prior to rescission of the delegation by the Secretary. We concur with Atlanta that distribution companies are presently subject to enforcement by the Secretary of Energy and that, under the rule of *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), this case is ripe for adjudication. In a substantial and practical business sense, local distribution companies are threatened with injury by the Secretary's incomplete regulations.

The urgency for the Secretary's providing compliance guidelines is exacerbated by the fact that no one other than the Secretary has statutory authority to assess monetary penalties under Section 723 for a violation of Section 402 and to collect such penalties, i.e., to "enforce" the prohibitions established under Section 402.[11] As shown above, enforcement powers granted to the Secretary under the Act are granted under Section 723. The power to assess penalties for violation of the Act is provided in Section 723(d). The Secretary may delegate to appropriate state authorities, pursuant to Section 402(e), his powers regarding outdoor lighting "under this Section". Section 402's authorities include the authority to establish prohibitions and grant exemptions. They do not include authority to assess and collect penalties.

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[10] 47 Fed. Reg. 23436, 23437 (May 28, 1982).

[11] This issue was briefed before the Eleventh Circuit but was not addressed in the circuit court's opinion.

CONCLUSION

A writ of certiorari should issue to review the judgement and the opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

JOHN A. MYLER
American Gas Association
1515 Wilson Boulevard
Arlington, Virginia 22209

Attorney for Appellant
Counsel of Record

APPENDIX

AMERICAN GAS ASSOCIATION, (including, where applicable, parents, other than wholly-owned subsidiaries, and affiliates):

ALABAMA GAS CORPORATION
ALAGASCO, INC.
ALAGASCO ENERGY COMPANY, INC.
ALAGASCO PIPELINE COMPANY
APPLEX EXPLORATION CORP.

ALASKA GAS & SERVICE COMPANY

ALGONQUIN GAS TRANSMISSION COMPANY
ALGONQUIN ENERGY, INC.

AMERICAN NATURAL RESOURCES COMPANY
MICHIGAN WISCONSIN PIPELINE COMPANY
ANR COAL COMPANY
ANR WESTERN COAL DEVELOPMENT COMPANY
BROOKS RUN COAL COMPANY
APACHE MINING COMPANY
VICC LAND COMPANY
VIRGINIA IRON, COAL AND COKE COMPANY
VICCO COAL COMPANY
VICCO INTERNATIONAL SALES CORPORATION
VICCO LEASING COMPANY
ANR FREIGHT SYSTEM, INC.
ASSOCIATED TRUCK LINES, INC.
ASSOCIATED TRUCK LINES OF CANADA, INC.
GARRETT FREIGHTLINES, INC.
GRAVES TRUCK LINE
ROAD EQUIPMENT FINANCING, INC.
NEUENDORF TRANSPORTATION COMPANY
NEW LIFE TRANSPORT PARTS CENTER, INC.
UNITED TRUCK RENTALS, INC.
ANG COAL GASIFICATION COMPANY
ANR GASIFICATION PROPERTIES COMPANY

ANR MEDIA COMPANY
ANR STORAGE COMPANY
ANR WESTERN STORAGE COMPANY
AMERICAN NATURAL ALASKAN COMPANY
AMERICAN NATURAL ARCTIC COMPANY
GREAT LAKES GAS TRANSMISSION COMPANY
TRANSCANADA PIPELINES LIMITED

ARANSAS NATURAL GAS COMPANY

ARIZONA PUBLIC SERVICE COMPANY

ARKANSAS OKLAHOMA GAS CORPORATION

ARKANSAS WESTERN GAS COMPANY
SOUTHWESTERN ENERGY COMPANY

ARKLA, INC.

ASHLAND GAS COMPANY

ATLANTA GAS LIGHT COMPANY

BALTIMORE GAS AND ELECTRIC COMPANY
SAFE HARBOR WATER POWER CORPORATION

BATTLE CREEK GAS COMPANY

BAY STATE GAS COMPANY
FITCHBURG GAS AND ELECTRIC LIGHT COMPANY
BOUNDARY GAS, INC.

BERKSHIRE GAS COMPANY

BOONVILLE NATURAL GAS CORPORATION

BOSTON GAS COMPANY
EASTERN GAS AND FUEL ASSOCIATES

BOWLING GREEN GAS COMPANY

BROOKLYN UNION GAS COMPANY
BOUNDARY GAS INC.

HONEOYE STORAGE CORPORATION
VIKING MANUFACTURING CORPORATION

CABOR CORPORATION OF WEST VIRGINIA, A DIVISION OF CABOR CORPORATION OF MASSACHUSETTS

CAMBRIDGE GAS COMPANY

CAPE COD GAS COMPANY
COLONIAL GAS COMPANY
TRANSGAS INC.
MASSACHUSETTS ASSOCIATES, INC.

CARNEGIE NATURAL GAS COMPANY
UNITED STATES STEEL CORPORATION
APOLLO GAS COMPANY

CAROLINA PIPELINE COMPANY
CAROLINA ENERGIES, INC.

CASCADE NATURAL GAS CORPORATION

CENTRAL FLORIDA GAS CORPORATION

CENTRAL HUDSON GAS & ELECTRIC CORPORATION

CENTRAL ILLINOIS LIGHT COMPANY

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY
ELECTRIC ENERGY, INC.

CHATTANOOGA GAS COMPANY, A DIVISION OF JUPITER INDUSTRIES, INC.

CHESAPEAKE UTILITIES CORPORATION

CHEYENNE LIGHT FUEL & POWER COMPANY

THE CINCINNATI GAS & ELECTRIC COMPANY
THE UNION LIGHT, HEAT AND POWER COMPANY

CITIES SERVICE GAS COMPANY
CITIES SERVICE COMPANY

CITIZENS GAS & COKE UTILITY

CITIZENS GAS FUEL COMPANY

CITIZENS UTILITIES COMPANY

CITY GAS COMPANY

CITY OF RICHMOND, DEPARTMENT OF PUBLIC UTILITIES

COLONIAL GAS COMPANY

COLORADO INTERSTATE GAS COMPANY
THE COASTAL CORPORATION
CIG EXPLORATION, INC.

THE COLUMBIA GAS SYSTEM, INC.
COLUMBIA GAS SYSTEM SERVICE CORPORATION
COLUMBIA LNG CORPORATION
COLUMBIA ALASKAN GAS TRANSMISSION CORPORATION
COLUMBIA COAL GAS TRANSMISSION CORPORATION
COLUMBIA COAL GASIFICATION CORPORATION
COLUMBIA HYDROCARBON CORPORATION
THE INLAND GAS COMPANY, INC.
COLUMBIA GAS OF KENTUCKY, INC.
COLUMBIA GAS OF MARYLAND, INC.
COLUMBIA GAS OF NEW YORK, INC.
COLUMBIA GAS OF OHIO, INC.
COLUMBIA GAS OF PENNSYLVANIA, INC.
COLUMBIA GAS OF VIRGINIA, INC.
COLUMBIA GAS OF WEST VIRGINIA, INC.
COLUMBIA GAS TRANSMISSION CORPORATION
COLUMBIA GAS DEVELOPMENT OF CANADA LTD.
COMMONWEALTH GAS SERVICES, INC.
COMMONWEALTH GAS PIPELINE CORPORATION
COMMONWEALTH PROPANE, INC.
COLUMBIA GULF TRANSMISSION COMPANY
BIG MARSH OIL COMPANY

HENRICO GAS SERVICE CORPORATION
ATLANTIC ENERGY, INC.

COMMERCIAL PIPELINE COMPANY, INC.

COMMONWEALTH ENERGY SYSTEM
COMMONWEALTH GAS COMPANY
CAMBRIDGE ELECTRIC LIGHT COMPANY
CANAL ELECTRIC COMPANY
COMMONWEALTH ELECTRIC COMPANY
COMMONWEALTH GAS COMPANY
COM/ENERGY ACUSHNET REALTY
COM/ENERGY CAMBRIDGE REALTY
COM/ENERGY EXPLORATION COMPANY
COM/ENERGY PRODUCTS COMPANY
COM/ENERGY REALTY TRUST
COM/ENERGY RESEARCH PARK REALTY
COM/ENERGY SERVICES COMPANY
COM/ENERGY STEAM COMPANY
DARVEL REALTY TRUST
HOPKINTON LNG CORP.
ALGONQUIN ENERGY, INC.

CONCORD NATURAL GAS CORPORATION

CONNECTICUT NATURAL GAS CORPORATION
FUELS, INC.
CNG REALTY CORPORATION
HARTFORD STEAM COMPANY
HARTFORD STEAM SERVICE COMPANY

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
HONEOYE STORAGE CORPORATION
BOUNDARY GAS, INC.

CONSOLIDATED NATURAL GAS COMPANY
CONSOLIDATED NATURAL GAS SERVICE COMPANY, INC.
CONSOLIDATED GAS SUPPLY CORPORATION
THE EAST OHIO GAS COMPANY
THE PEOPLES NATURAL GAS COMPANY
THE RIVER GAS COMPANY

WEST OHIO GAS COMPANY
CNG PRODUCING COMPANY
CONSOLIDATED SYSTEM LNG COMPANY
CNG RESEARCH COMPANY
CNG COAL COMPANY

CONSUMERS POWER COMPANY

CONTINENTAL RESOURCES COMPANY

CORNING NATURAL GAS CORPORATION

COUNTIES GAS COMPANY

CUT BANK GAS COMPANY

THE DAYTON POWER AND LIGHT COMPANY

DELMARVA POWER & LIGHT COMPANY

DISTRIGAS CORPORATION

EAST TENNESSEE NATURAL GAS COMPANY

EASTERN GAS & WATER INVESTMENT COMPANY

EASTERN SHORE GAS COMPANY

EL PASO NATURAL GAS COMPANY
THE EL PASO COMPANY
DESERT AMERICAN INSURANCE AGENCY, INC.
EL PASO EUROPE
GEONUCLEAR NOBEL PASO

ELIZABETHTOWN GAS COMPANY

ELK RIVER PUBLIC UTILITY DISTRICT

ENERGAS COMPANY

ENTERPRISE RESOURCES, INCORPORATED
STONE & WEBSTER, INCORPORATED

ENTEX, INC.

EQUITABLE GAS COMPANY
KENTUCKY WEST VIRGINIA GAS COMPANY
KENTUCKY HYDROCARBON COMPANY
KEPCO, INC.
PHILADELPHIA OIL COMPANY
BEREA GATHERING COMPANY
EQUITABLE GAS-ENERGY COMPANY

FALL RIVER GAS COMPANY

FITCHBURG GAS & ELECTRIC LIGHT COMPANY

FLORIDA PUBLIC UTILITIES COMPANY

GAINESVILLE GAS COMPANY

GAS DIVISION, CITY OF CHARLOTTESVILLE, VA

GASCO, INC.
PACIFIC RESOURCES, INC.
HAWAII ENERGY RESOURCES, INC.
ENERCO, INC.
HAWAIIAN INTERNATIONAL SHIPPING CORP.
PRI SOLAR, INC.
P.R.I.T. HONG KONG LTD.
P.R.I.N. LTD.
PROMANA, INC. (Hawaii)
HAWAIIAN INDEPENDENT REFINERY, INC.
PRI INTERNATIONAL, INC.
PACIFIC RESOURCES TERMINALS, INC.
PETROTERM, INC.
PRI NORTHWEST, INC.
PRIVITY, INC.
PROMAN, INC. (Delaware)
PACIFIC RESOURCES, LTD.
PACIFIC RESOURCES (Liberia), INC.
BREWER PACIFIC AGRONOMICS CO.

GAS LIGHT COMPANY OF COLUMBUS

GAS SERVICE COMPANY

GAS SERVICE, INC.

GAS UTILITIES COMPANY

GREAT FALLS GAS COMPANY

GREAT RIVER GAS COMPANY

GREELEY GAS COMPANY

GULF NATURAL GAS CORPORATION

HAVERHILL GAS COMPANY

HOOSIER GAS CORPORATION

HOUSTON NATURAL GAS CORPORATION
- OASIS PIPE LINE COMPANY
- HT GATHERING COMPANY
- RED RIVER PIPELINE
- RED RIVER PIPELINE CORPORATION
- SAN MARCO PIPELINE COMPANY
- MATAGORDA TERMINALS, LTD.
- MATAGORDA PLANT
- ROBSTOWN PLANT
- HOUSTON PIPELINE COMPANY

ILLINOIS GAS COMPANY

INDIANA GAS COMPANY, INC.

INDIANA NATURAL GAS CORPORATION

INDIANA UTILITIES CORPORATION

INDIANTOWN GAS CO. INC.

INTERMOUNTAIN GAS COMPANY
- INTERMOUNTAIN GAS INDUSTRIES, INC.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY

IOWA POWER AND LIGHT COMPANY
- IOWA RESOURCES INC.
- ENERCOR, INC.
- IOWA POWER RESOURCES, INC.
- REDLANDS, INC.

MIDDLEWOOD, INC.
IOWA COMPUTER RESOURCES INC.
UNITRAIN INC.
WESCON INDUSTRIES, INC.
ENSERCO, INC.
H. L. HOAK COMPANY, INC.

IOWA PUBLIC SERVICE COMPANY

JACKSON UTILITY DIVISION, CITY OF JACKSON, TENN.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC.

KANSAS POWER & LIGHT COMPANY

KANSAS PUBLIC SERVICE COMPANY, INC.

KENTUCKY WEST VIRGINIA GAS COMPANY

KNOXVILLE UTILITIES BOARD

KOKOMO GAS & FUEL COMPANY

LAKE SUPERIOR DISTRICT POWER COMPANY

LEWISBURG GAS COMPANY

LONE STAR GAS COMPANY, A DIVISION OF ENSERCH CORPORATION
ENSERCH CORPORATION

LONG ISLAND LIGHTING COMPANY

LOWELL GAS COMPANY

LUMBERPORT SHINNSTON GAS COMPANY, INC.

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MADISON GAS AND ELECTRIC FOUNDATION, INC.
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MAGAEL MATERIAL RESOURCES, INC.
MG&E NUCLEAR FUEL INC.

MANCHESTER GAS COMPANY

MEMPHIS LIGHT, GAS & WATER DIVISION

MERCER GAS COMPANY

METROPOLITAN UTILITIES DISTRICT

MICHIGAN CONSOLIDATED GAS COMPANY
- PRIMARK CORPORATION
- MICHCON CONSERVATION COMPANY
- MICHIGAN CONSOLIDATED HOMES LIMITED
- DIVIDEND HOUSING CORPORATION

MICHIGAN GAS UTILITIES COMPANY
- MICHIGAN ENERGY RESOURCES COMPANY
- SOUTHERN MICHIGAN PRODUCTION COMPANY
- COMMUNICATIONS AND CABLEVISION, INC.
- KENERGY PETROLEUM CORPORATION
- MGU DEVELOPMENT CO.

MIDCON CORP.
- ANTHRUST, INC.
- BUCKHORN PETROLEUM CO.
- CHAPPERAL COAL CORPORATION
- E.K. COAL CO., INC.
- EMPIRE COAL COMPANY
- EXETER CANADIAN EXPLORATION, LTD.
- EXETER CAPITAL CORPORATION
- EXETER COMPANY
- EXETER DRILLING CENTRAL, INC.
- EXETER DRILLING NORTHERN, INC.
- EXETER EXPLORATION COMPANY
- EXETER SERVICE COMPANY
- EXETER VENTURES CORPORATION
- FAIRWAY COAL COMPANY
- HARPER OIL COMPANY
- INDUSTRIAL FUELS CORPORATION
- M & O COAL COMPANY
- NAAACO, INC. (Del.)
- NAERCO, INC.
- NALOCO, INC. (Del.)
- NANBCO INC.

NAPECO INC.
NATOCO, INC.
NATURAL GAS PIPELING COMPANY OF AMERICA
NATURAL-TRINIDAD AND TOBAGO ENGINEERING COMPANY
NGPL-CANYON COMPRESSION CO.
NGPL EXPLORATION COMPANY
NGPL LIQUIDS, INC.
NGP-LNG, INC.
NGPL-OVERTHRUST INC.
NGPL TERMINAL COMPANY
NGPL-TRAILBLAZER INC.
NGLP WILLISTON, INC.
MCN EXPLORATION COMPANY
NGPL OFFSHORE COMPANY
MCN OVERSEAS INC.
MCN-TRINIDAD AND TOBAGO LNG COMPANY
MCN COAL GASIFICATION COMPANY
NORTH SHORE GAS COMPANY
PEOPLES ENERGY CORPORATION
PEOPLES GAS LIGHT & COKE COMPANY
PRATER CREED PROCESSING COMPANY
RED CEDAR MINING COMPANY, INC.
TEXOMA PRODUCTION COMPANY
TWIN OAKS COAL COMPANY
UMET MINING CORPORATION
WEATCOAL CORPORATION
WOLVERINE MINING CORPORATION

MIDDLE TENNESSEE UTILITY DISTRICT

MIDWESTERN GAS TRANSMISSION COMPANY

MILLER GAS COMPANY

MINNESOTA GAS COMPANY

MISSISSIPPI VALLEY GAS COMPANY

MOBILE GAS SERVICE CORPORATION

MONTANA-DAKOTA UTILITIES COMPANY

MORAN UTILITIES COMPANY

MT. CARMEL PUBLIC UTILITY CO.

MOUNTAIN FUEL SUPPLY COMPANY

NASHVILLE GAS COMPANY
- TENNESSEE NATURAL GAS LINES, INC.
- ALABAMA OXYGEN COMPANY, INC.
- TENNESSEE OXYGEN COMPANY

NATIONAL FUEL GAS DISTRIBUTION CORPORATION
- NATIONAL FUEL GAS COMPANY
- NATIONAL FUEL GAS SUPPLY CORPORATION
- SENECA RESOURCES CORPORATION
- PENN-YORK ENERGY CORPORATION

NEW JERSEY NATURAL GAS COMPANY
- NEW JERSEY RESOURCES CORPORATION
- GAS ASSOCIATED SERVICES, INC.
- NEW JERSEY NATURAL RESOURCES COMPANY

NEW ORLEANS PUBLIC SERVICE INC.
- MIDDLE SOUTH UTILITIES, INC.
- SYSTEM FUELS, INC.
- ARKANSAS POWER & LIGHT COMPANY
- LOUISIANA POWER & LIGHT COMPANY
- MISSISSIPPI POWER & LIGHT COMPANY
- MIDDLE SOUTH SERVICES, INC.
- MIDDLE SOUTH ENERGY, INC.

NEW YORK STATE ELECTRIC & GAS CORPORATION
- SOMERSET RAILROAD CORPORATION

NIAGARA MOHAWK POWER CORPORATION
- BEEBEE ISLAND CORPORATION
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WISCONSIN RIVER POWER COMPANY

WISCONSIN SOUTHERN GAS COMPANY
J. H. FAGAN COMPANY

WYOMING GAS COMPANY

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No. 81-2325

IN THE

Supreme Court of the United States

October Term, 1982

ATLANTA GAS LIGHT COMPANY,
Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY,
Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

REPLY BRIEF OF ATLANTA GAS LIGHT COMPANY TO OPPOSITION OF THE UNITED STATES DEPARTMENT OF ENERGY

John E. Holtzinger, Jr.
Karol Lyn Newman
(Counsel of Record)
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-3891

Attorneys for Petitioner

Of Counsel:

Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

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No. 81-2325

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REPLY BRIEF OF ATLANTA GAS LIGHT COMPANY TO OPPOSITION OF THE UNITED STATES DEPARTMENT OF ENERGY

The weakness of the Government's opposition and its inexplicable misstatements of the record reflect its inability to support the Eleventh Circuit's dismissal of Atlanta Gas' review petition against this Court's holding in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and Section 702 of the Fuel Use Act, 42 U.S.C. § 8412.

ARGUMENT

The Government argues that Petitioner "seriously misstates . . . the holding of *Abbott Laboratories*". (Gov't at 8). On the contrary; it is the Government which mistates this Court's holding in an effort to obfuscate the fact that Atlanta Gas' case is on all fours with *Abbott Laboratories*.

In *Abbott Laboratories*, the Court was faced with a decision by the Third Circuit that a pre-enforcement challenge to effective regulations under the Food, Drug, and Cosmetic Act was not ripe for review because there was no actual case or controversy.

Here, the Court is faced with a decision by the Eleventh Circuit that because no enforcement action has been brought against Atlanta Gas, its pre-enforcement challenge to effective regulations under the Fuel Use Act is not ripe for review.

In *Abbott Laboratories* the Court first analyzed whether Congress intended to forbid pre-enforcement review of the challenged regulation, noting:

> The question is phrased in terms of "prohibition" rather than "authorization" because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.

387 U.S. at 140. Because the statute did not specifically provide for review of the regulation in question, the Court reviewed its legislative history to determine whether Congress intended to bar pre-enforcement review. Finding no such intent and emphasizing the reluctance of the Court to cut off "the well-established jurisdiction of the federal courts to hear, in appropriate cases, suits . . . challenging final agency action" (387 U.S. at 148) the Court concluded

that the Food, Drug and Cosmetic Act did not preclude pre-enforcement review.

Here, Section 702 of the Fuel Use Act specifically provides for pre-enforcement review of agency regulations.

The *Abbott Laboratories* Court then examined whether the case was "ripe" for judicial review. Guided by the basic rationale of the ripeness doctrine—to prevent the courts from entangling themselves in abstract disagreements over administrative policies, and to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way—the Court found that because the issue was purely legal and because the regulations were "final agency action" which had an immediate effect on the conduct of the petitioners' affairs, the case was ripe for review.

In so ruling, the Court rejected the Government's argument that because only the Attorney General, not the agency, could authorize the institution of criminal or civil actions the case was not ripe for review:

> These regulations are not meant to advise the Attorney General, but purport to be directly authorized by the statute. Thus, if within the Commission's authority, they have the status of law and violations of them carry heavy criminal and civil sanctions.

387 U.S. at 152. The Court also disregarded the Solicitor General's representation that if enforcement should become necessary, the Department of Justice would proceed only civilly for an injunction or by condemnation:

> [W]e cannot accept this argument as a sufficient answer to petitioners' petition. This action at its inception was properly brought and this

> subsequent representation of the Department of Justice should not suffice to defeat it.

387 U.S. at 154.

Here, the Government argues that Atlanta Gas' challenge is not ripe for review because, until an enforcement action is brought, Atlanta Gas cannot be "aggrieved" by the Secretary's regulations. And, the Government continues, because enforcement power has been delegated to the States, Atlanta Gas' challenge can only be ripe for review if it relates to action taken by the State of Georgia. The Government's arguments parrot the arguments made and rejected over fifteen years ago in *Abbott Laboratories*. Similarly, the arguments should be rejected now.

What the Court said in *Abbott Laboratories* is surely applicable here, where the federal agency itself transferred its enforcement authority to the States:

> These regulations are not meant to advise . . . [the States], but purport to be directly authorized by the statute. Thus, if within the . . . [Secretary's] authority, they have the status of law and violations of them carry heavy . . . civil sanctions.

387 U.S. at 152. Who is responsible for enforcement of the Secretary's regulation is immaterial. What is material is that the regulations are in effect, carry the force of law, and directly affect the conduct of Atlanta Gas' gas distribution operation.

The Government argues that the case is not ripe for review because, were the Secretary to rescind his delegation and exercise his enforcement authority, "petitioner does not suggest, nor is it plausible to assume, that any reversion of authority to the federal government would result in federal prosecution for violations that occurred during the time the delegation was in effect". (Gov't at 9). As this Court noted in *Abbott Laboratories*, this does not answer petitioner's petition. Atlanta Gas' proceeding was properly brought at

its inception and this representation by the Solicitor General should not defeat it.

In a final effort to convince this Court that Atlanta Gas' underlying due process challenge is without merit, the Government seriously misstates the record below.

The Government states that petitioner does not deny that there are gas lights on the company's side of the gas meter over which the Petitioner has full control (Gov't at 11-12). This statement simply is not true. In the record below, the following statement from the testimony of the President of Atlanta Gas in hearings before the Department of Energy makes it clear that *all* of the gas lights served by Atlanta Gas are located downstream of the meter, that is, on the customer's side of the meter:

> All of our gas lights were connected downstream of the meter, and thus they represent the property of the homeowner.

(J.A. 198). The continuation of this quotation from the record demonstrates that without terminating *all* gas service to the customer, Atlanta Gas cannot ensure compliance with the federal regulations requiring it to discontinue service to outdoor gas lights:

> Let's assume, for purpose of the discussion, that through efforts of our employees we do locate all of the gas lights on customers' premises. What then?
>
> The company can, of course, notify the customer that he must disconnect his gas lights but, knowing the people in Georgia, I doubt that any of them would do it because we asked them to.
>
> There is nothing in the company's rules and regulations that permits the company to enter upon the premises of its customer, except to read the meter and to maintain our company's facilities on a customer's premises.

* * *

> The problem is under this law the use is not illegal. The customer still can burn it and its legal for him to do so.
>
> What is unlawful is for us to provide the service, which is quite a dilemma.

(J.A. 198-199).

And, the Government's cavalier suggestion to this Court, that State trespass laws, utility laws, and the common law duty of a public utility to provide continuous and reliable service are preempted so as to authorize Atlanta Gas to terminate all gas service to a customer who continues to use his outdoor gas light or enter on the customer's property to disconnect the gas light, is preposterous. No such broad preemption authority has been shown, nor does it exist. In fact, the disingenuity of this argument is shown by the following colloquy from the record below, where the Government explicitly refused to include in its regulations language to clarify the preemptive nature of the statute and its regulations:

> Mr. LaBoon [President of Atlanta Gas]: The big hangup, as I see it, is the Act itself doesn't pass on any legal authority to a State nor to the utility . . . [to] force a man to turn his gas off.
>
> In fact, the Act doesn't even make it illegal for the homeowner to burn the gas light.
>
> Ms. Rowan [Hearing Officer]: That's some of our own problem.
>
> Mr. LaBoon: I understand that.
>
> Ms. Rowan: We question whether or where in Section 402 of FUA, or any place else in FUA applicable to 402, that we would have the authority to issue regulations that would give you the type of protection that you're talking about.

(J.A.200).

* * *

> Mr. Elliott [Vice President, Laclede Gas Company]: ... [Y]ou are supposed to give us guidelines, according to the conference report.
>
> Ms. Rowan: Our problem is that we don't see how mere guidelines is [sic] going to remove threats such as potential threats say of criminal trespass prosecutions if you go on private land... I don't see in the statute at this point where we are given the authority.

(J.A. 205).

CONCLUSION

The case before the Court is *Abbott Laboratories*, revisited. The essential, uncontroverted facts, as set forth in the petition are:

1. The Fuel Use Act specifically provides that judicial review may be sought by any person aggrieved by final agency rules imposing a prohibition;
2. The challenged regulation is a final agency rule imposing a prohibition;
3. The challenged regulation is in effect;
4. The challenged regulation directly impacts on petitioner;
5. Heavy civil fines and penalties attach for non-compliance; and
6. Compliance with the regulation requires significant changes in the operations of Atlanta Gas.

The Government's opposition simply reveals its reluctance to accept this Court's holding in *Abbott Laboratories*, a holding from which the Eleventh Circuit significantly departed.

To avoid the erosion of the principles established by this Court in *Abbott Laboratories*, the petition should be granted and the case remanded to the United States Court

of Appeal for the Eleventh Circuit. Petitioner suggests that further briefing or argument to this Court is unnecessary and that, in view of the weakness of the Government's opposition, summary reversal is clearly in order.

Respectfully submitted,

John E. Holtzinger, Jr.
Karol Lyn Newman
(Counsel of Record)
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-3891